82 No. 174

Office - Supreme Court, U.S.
FILED
AUG 2 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.,
Petitioner,

vs.

FRANK J. OSTROVE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES T. FOUSEKIS
(Counsel of Record)
LEO L. FINKELSTEIN
STEINHART & FALCONER
333 Market Street,
Suite 3200
San Francisco, CA 94105
(415) 777-3999
Attorneys for Petitioner
H. S. Crocker Company,
Inc.

Dated: August 2, 1982

BOWNE-PERNAU WALSH • 180 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Does an employee who alleges wrongful discharge as a means of effectuating an alleged price-fixing conspiracy have standing to bring a private antitrust treble damage action against his employer under Section 4 of the Clayton Act?

2. Does every alleged price-fixing conspiracy inherently include a subsidiary conspiracy to boycott non-cooperating employees, so that, based solely on evidence of possible price-fixing, a former employee may automatically maintain an action for conspiracy to boycott his services under Section 4 of the Clayton Act without presenting any evidence to rebut his employer's showing, on motion for summary judgment, that (i) the employee resigned despite the employer's request that he stay, (ii) the employee was not interested in and never sought further employment in the industry in question, and (iii) no agreement to boycott the employee ever existed?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Jurisdiction	1
Provisions of law involved	2
Statement of the case	3
(a) Factual background	3
(b) The three district court decisions	4
(c) The Ninth Circuit decision	7
Reasons for granting the writ	9
I	
The Court of Appeals Decision Is in Direct Conflict with Standing Decisions of the Courts of Appeals in Other Circuits	14
II	
McCready Did Not Decide the Limits of Antitrust Standing; this Case Presents the Perfect Opportunity To Do So	19
III	
The Court of Appeals Decision Impermissibly Uses an Inference of Conspiracy, in Lieu of Evidence, to Reverse a Proper Grant of Summary Judgment	23
Conclusion	28

TABLE OF AUTHORITIES CITED

Cases

Page

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 26

Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981) 11, n.25

Bichan v. Chemetron Corp., ... F.2d ....., 1982-2 CCH Trade Cases ¶ 64,807 (7th Cir. 1982), affirming Bichan v. Chemetron Corp., 1981-2 CCH Trade Cases ¶ 64,293 (N.D. Ill. 1981) 10, 11, 14, 15, 16, 18, 21, n.44; 22, n.46

Blue Shield of Virginia v. McCready, 50 U.S.L.W. 4723 (1982) 12, 19, 20, 21, 22, 23

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 8, 9

Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972) 11, n.24; 19, n.41

Callahan v. Scott Paper Co., No. 81-3786, 43 ATRR 199 (E.D. Pa. 1982) 10, n.20; 14, n.32; 15, n.34

Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952) 4, n.5

Contreras v. Grower Shipper Vegetable Association of Central California, 484 F.2d 1346 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974) 4, n.5

Engine Specialties, Inc. v. Bombardier, Ltd., 605 F.2d 1 (1st Cir. 1979), cert. denied, 446 U.S. 983 (1980) 11, n.23

Table of Authorities Cited

Cases

Page

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 13, 25, 26, 27

Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068 (3d Cir. 1978) 27, n.60

Golf City, Inc. v. Wilson Sporting Goods Co., Inc., 555 F.2d 426 (5th Cir. 1977) 26

Gutierrez v. E & J Gallo Winery Company, 604 F.2d 645 (9th Cir. 1979) 4, n.5

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 9

Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) 26

Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979) 18, n.40

McNulty v. Burden, No. 76-3952, 43 ATRR 10 (E.D. Pa. 1982) 10, n.20; 14, n.32

In Re Multidistrict Vehicle Air Pollution, MDL No. 31, 481 F.2d 122 (9th Cir.), cert. denied sub nom. Morgan v. Automobile Manufacturers Assoc., Inc., 414 U.S. 1045 (1973) 4, n.5

Moore v. Chesapeake & Ohio Railway Co., 340 U.S. 573 (1951) 25, n.56

Natrona Service, Inc. v. Continental Oil Co., 598 F.2d 1294 (10th Cir. 1979) 27, n.60

Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832 (2d Cir. 1980) 27, n.60

Perry v. Hartz Mountain Corp., 537 F.Supp. 1387 (S.D. Ind. 1982) 10, n.20; 14, n.32-33; 18, n.39

Table of Authorities Cited

Cases

Page

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962) 24, n.52

Program Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188 (9th Cir. 1980) 4, n.5

Radovich v. National Football League, 352 U.S. 445 (1957) 15-16, n.35

Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), cert. denied, 411 U.S. 938 (1973) 11, n.27

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 24, n.52

Sanitary Milk Producers v. Bergjans Farm Dairy, Inc., 368 F.2d 679 (8th Cir. 1966) 11, n.26

Shaw v. Russell Trucking Line, Inc., No. 81-1852, 43 ATRR 198 (W.D. Pa. 1982) 10, n.20

Solinger v. A & M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979) 4, n.5

Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979) 18, n.40

Tameny v. Atlantic Richfield Company, 27 Cal.3d 167 (1980) 18, n.39

Theatre Enterprises, Inc. v. Paramount Film Dist. Corp., 346 U.S. 537 (1954) 26

Tose v. First Pennsylvania Bank, 648 F.2d 879 (3d Cir.), cert. denied, 102 S.Ct. 390 (1981) 26, n.59

Tripoli Co. v. Wella Corp., 425 F.2d 932 (3d Cir.), cert. denied, 400 U.S. 831 (1970) 27, n.60

Table of Authorities Cited

Cases

Page

Weit v. Continental Illinois National Bank & Trust Co., 641 F.2d 457 (7th Cir. 1981), cert. denied, 102 S.Ct. 1510 (1982) 26, n.59; 27, n.60

George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975) 18, n.40

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F.Supp. 1100 (E.D. Pa. 1981) 26, n.58

Statutes

Clayton Act, Section 4 (15 U.S.C. § 15) ..... passim

28 U.S.C.:

§ 1254(1) 2

§ 1291 2

§ 1294 2

§ 1337 2

Rules

Federal Rules of Appellate Procedure, Rule 41(b) 2

Federal Rules of Civil Procedure, Rule 56 ..... 2, 24, 26

Other Authorities

Areeda and Turner, *Antitrust Law* ¶¶ 334-341 (1978) 12, n.29

Antitrust and Trade Regulation Report, Volume 43, No. 1073, July 15, 1982 ..... 10, n.19

No. .....

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.,
Petitioner,

VS.

FRANK J. OSTROFE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on March 8, 1982.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals, reported at 670 F.2d 1378 and at 1982-1 *Trade Cases* ¶ 64,643, are set out in Appendix A to this Petition. The prior 1977, 1975, and 1974 decisions of the district court are unreported, and appear in Appendix B, Appendix C, and Appendix D, respectively.

JURISDICTION

The judgment of the Court of Appeals was filed on March 8, 1982. A timely petition for rehearing with suggestion for rehearing en banc was denied on May 6, 1982,

following a vote of the court on the suggestion for rehearing en banc. The court's denial appears in Appendix E. On May 13, 1982, the Court of Appeals stayed its mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, pending the filing of this petition for a writ of certiorari; thereafter the court extended the stay of mandate to August 4, 1982.

This court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294. Jurisdiction was asserted in the district court under 28 U.S.C. § 1337 and § 4 of the Clayton Act (15 U.S.C. § 15).

PROVISIONS OF LAW INVOLVED

Clayton Act, Section 4 (Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rule 56, Federal Rules of Civil Procedure. Summary Judgment:

> . . . .
>
> (e) *Form of Affidavits; Further Testimony; Defense Required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or

further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

. . . .

STATEMENT OF THE CASE

(a) Factual Background

Petitioner H. S. Crocker Company, Inc. ("Crocker") is a manufacturer of lithograph paper labels. Respondent Frank J. Ostrofe is a former employee of petitioner. In July 1970, respondent resigned from his sales position with Crocker to embark upon a career as a stockbroker. Following his resignation, respondent never applied for reemployment with Crocker and, as respondent has conceded throughout these proceedings, was not interested in applying and did not apply for a job with any other label manufacturer.[1]

In January 1974, three and one-half years after his resignation from Crocker, respondent filed this private antitrust action under Section 4 of the Clayton Act (15 U.S.C. § 15), alleging that Crocker and other unnamed paper label manufacturers were engaged in a conspiracy to fix prices and allocate customers of paper labels, that the alleged conspiracy included an agreement to boycott those persons, including respondent, who interfered or threatened to interfere with the alleged conspiracy, and that respondent was forced to resign his position as a result of the alleged conspiracy.

The first of these allegations was not new. Prior to the filing of this suit, a national class action had been filed against Crocker and other defendants by label customers,

---

[1] *See* Appendix B at 7-14; Appendix C at 9.

the alleged objects of the price-fixing conspiracy, and had been settled by Crocker.[2] In addition, the Department of Justice had conducted an antitrust investigation of the label industry, and in March 1974 filed both civil and criminal antitrust actions against Crocker.[3] Thus, excluding this action, Crocker already has been subject to criminal and civil government actions, a national class action by customers, and a separate civil action by a single customer[4] with respect to the price-fixing and customer allocation charges alleged by respondent.

(b) The Three District Court Decisions

In April 1974, Crocker moved to dismiss the complaint on the ground that respondent lacked standing to sue under the well-established "target area" test of antitrust standing.[5] On December 4, 1974, the trial court ruled that re-

---

[2]*Sun Garden Packing v. International Paper Co. et al.*, C72-592 CBR filed on March 31, 1972, Judgment of Dismissal by settlement filed on May 10, 1973.

[3]*U.S. v. H. S. Crocker* (criminal), Cr. 74 182 CBR; *U.S. v. H. S. Crocker*, Criminal Petition C2424-R; *U.S. v. H. S. Crocker*, Civil No. C74-0560 CBR, all filed March 12, 1974.

[4]The single customer action, *Kockos Bros. Inc. v. H. S. Crocker*, C73-1633 WTS, was filed in 1973, before the filing of this action, and subsequently was settled by Crocker.

[5]Until its decision in this case, the Ninth Circuit had consistently adhered to the "target area" test for standing to sue under Section 4 of the Clayton Act and had denied standing to persons such as employees not within the area of the economy endangered by the breakdown of competitive conditions. *See, e.g., Program Engineering, Inc. v. Triangle Publications, Inc.*, 634 F.2d 1188 (9th Cir. 1980); *Gutierrez v. E & J Gallo Winery Company*, 604 F.2d 645 (9th Cir. 1979); *Solinger v. A & M Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), *cert. denied*, 441 U.S. 908 (1979); *Contreras v. Grower Shipper Vegetable Association of Central California*, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *In Re Multidistrict Vehicle Air Pollution, MDL No. 31*, 481 F.2d 122 (9th Cir.), *cert. denied sub nom. Morgan v. Automobile Manufacturers Assoc., Inc.*, 414 U.S. 1045 (1973); *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

spondent indeed lacked standing to sue because, as an employee, he was not in the target area of the alleged conspiracy to fix prices and allocate customers of paper labels.[6] Nevertheless, the court held that insofar as the complaint alleged a conspiracy to boycott employees who interfered with the alleged price-fixing conspiracy, the alleged boycott could be considered a separate conspiracy which respondent had standing to challenge. In light of the boycott allegations, therefore, the court denied the motion to dismiss, "without prejudice, however, to a properly documented motion for summary judgment. . . ."[7]

Thereafter, Crocker propounded a brief set of interrogatories to respondent concerning the alleged boycott. In response to these interrogatories, respondent conceded that he had not applied for employment with *any* label manufacturer following his resignation from Crocker. On the basis of this concession, Crocker moved, in June 1975, for summary judgment on the ground that respondent's failure to demand employment barred his boycott claim as a matter of law. On August 29, 1975, during the pendency of Crocker's motion for summary judgment, respondent belatedly moved for leave to amend his complaint to allege, in substance, that Crocker's alleged termination of respondent was a unilateral refusal to deal in furtherance of the alleged price-fixing conspiracy.

The district court disposed of both motions in its Memorandum of Decision dated December 2, 1975.[8] The court denied Crocker's motion for summary judgment because, on the record then before it, there remained a factual issue as to whether it would have been futile for respondent to apply for employment.[9] The court also denied respondent's motion to amend the complaint, holding that respondent's

---

[6]Appendix D at 3-9.

[7]*Id.* at 12.

[8]Appendix C.

[9]*Id.* at 9-20.

"unilateral refusal to deal" theory could not permit him to do indirectly that which he had no standing to do directly, namely, complain of the alleged price-fixing conspiracy.[10]

Crocker then engaged in discovery to determine whether there was any factual basis for respondent's claim that it would have been futile to demand employment and, more importantly, whether there was any factual evidence of the alleged boycott itself. To this end, Crocker took the depositions of executives at three nationally known label manufacturers identified by respondent as having been participants in the alleged price-fixing conspiracy and boycott conspiracy. In the course of these depositions, *which respondent failed to attend,* each of the executives stated that he had never discussed respondent's employment with anyone in the label manufacturing industry; that he had never agreed in any way to boycott respondent or to prevent respondent from being employed in the industry; that he had no reason to believe that any conspiracy to boycott respondent existed; and that had respondent applied for a job with his company, respondent's application would have received the same consideration as that accorded any other applicant. Meanwhile, respondent's own discovery efforts were virtually nonexistent.[11]

In September 1977, three and one-half years after the filing of the complaint and almost two years after disposition of the prior summary judgment motion, Crocker filed a second motion for summary judgment based upon the total absence from the record of any evidence that a boy-

---

[10] *Id.* at 4-9.

[11] Apart from initial discovery filed simultaneously with the complaint, respondent's entire discovery efforts consisted of a single two-page set of interrogatories seeking information about Crocker's gross sales, profits and salary levels. During the entire pendency of this action, respondent did not take a single deposition or make any other effort to bring this case to trial or to attempt to develop any factual support for his claims.

cott existed, or that it would have been futile for respondent to demand employment with Crocker or with any other label manufacturer. Respondent replied with only a four-page memorandum in opposition to the motion.[11] In light of respondent's failure to provide any evidence of the alleged boycott, District Court Judge Cecil Poole granted summary judgment for Crocker on October 7, 1977.[12]

(c) The Ninth Circuit Decision

On March 8, 1982, approximately two years after oral argument, a divided panel of the Ninth Circuit reversed the district court's rulings on the motions to dismiss, to amend the complaint, and for summary judgment. In an opinion written by Chief Judge Browning, the majority held that a discharged employee has standing under Section 4 to challenge an alleged price-fixing conspiracy involving his former employer. Expressly abandoning prior precedents, the majority held that antitrust standing should be determined by "a balancing of competing policy interests, principally the interest in effective enforcement of the antitrust laws against the interest in avoiding vexatious

---

[11]The majority below erroneously stated in its opinion that respondent offered "affidavits" in support of his allegations. The accurate facts are that respondent filed only *one affidavit* in this case, and that was in 1975; *no* affidavits were offered in 1977.

[12]*See* Appendix B. In the hearing on Crocker's summary judgment, Judge Poole summarized the state of the record as follows:

> "The Court: Can you point to any evidence of intimidation or ostracism or coercion that is alleged to have taken place since the time he voluntarily resigned?
>
> "Mr. Lamont: I suppose that we can't.
>
> . . . .
>
> "The Court: He has not, since that time, made any request to come back in the field, nor is there any evidence in the record that anybody said, 'You can't get back in.'
>
> "Mr. Lamont: That's correct.
>
> "The Court: That's all I have before me."

A complete transcript of the hearing is included in Appendix B.

litigation and excessive liability."[14] The majority expressed the view that its new approach was not contrary to the decision of this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), because it concluded that *Brunswick* does not limit Section 4 of the Clayton Act to suits for damages flowing from the breakdown of competitive conditions that makes the alleged conduct unlawful.[15]

The majority also held that respondent's evidence of the existence of a price-fixing conspiracy was *per se* sufficient to create a triable factual issue as to whether there existed a subsidiary conspiracy to boycott his services. The majority did not dispute the district court's finding that there was absolutely no evidence of any conspiracy relating to respondent's employment. It concluded, however, that "a trier of fact might reasonably infer from evidence of the existence of [a price-fixing] conspiracy that each of the participating companies had also impliedly agreed . . . that any non-cooperating employee who jeopardized implementation of the conspiracy would be removed from his or her position and would not be rehired."[16]

Judge Kennedy dissented, noting that the effect of the majority's decision is to permit what is essentially a claim for wrongful discharge cognizable under state tort law to be prosecuted as a federal antitrust claim. In Judge Kennedy's view, a discharged employee challenging a price-fixing conspiracy by his former employer does not state a claim for injury by "reason of anything forbidden in the antitrust laws":

> "Here, the main conspiracy alleged as the premise of liability was not one to harm employees. It was one to fix prices and allocate customers in the nationwide market for paper labels. Appellant was not in the area of the economy endangered by the breakdown of

---

[14] Appendix A at 11.

[15] *Id.* at 20-24.

[16] *Id.* at 25.

competitive conditions; that is, he was not injured by the labels industry breakdown 'the antitrust laws were intended to prevent,' *Brunswick*, 429 U.S. at 489. It may be true, under appellant's theory, that in a strict causation sense the employee's termination resulted from the conspiracy, but collateral damages to persons outside the competitive area aggrandized by antitrust defendants are inconsistent with the orderly administration of the antitrust laws. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The congressional concern underlying the substantive provisions of the antitrust laws was competition, not employee coercion or discharge. Appellant's intimate relation with the scheme is not sufficient; he must be intimately related to its anticompetitive effect."[17]

Judge Kennedy also dissented from the majority's decision to permit respondent's claim of a subsidiary employee boycott to be brought to trial based on the "inference" that a price-fixing conspiracy inherently includes a conspiracy to boycott non-cooperating employees. Judge Kennedy noted that respondent "resigned voluntarily from the company despite their request for him to stay," and "did not attempt to obtain employment with any other industry employer. . . . The district court properly granted summary judgment on the boycott claim for failure to come forward with evidence to support the charge."[18]

REASONS FOR GRANTING THE WRIT

The unprecedented decision of the Ninth Circuit in this case squarely conflicts with decisions of other Circuits and is contrary to prior decisions of this Court on the important issues of the scope of standing to sue under Section 4 of the Clayton Act and the applicable criteria for granting summary judgment. This Court should grant certiorari to resolve the "growing conflict over the Clayton Act § 4

---

[17] *Id.* at 40-41.

[18] *Id.* at 45.

standing of employees" who file antitrust claims to challenge their terminations,[19] to reaffirm the authority of this Court's rulings on the standards for summary judgment, and to prevent this burgeoning class of employee discharge cases from further burdening the federal courts.[20]

The Ninth Circuit's primary holding—that an employee allegedly discharged by his employer pursuant to an alleged price-fixing conspiracy may sue for *antitrust* recovery—is in direct conflict with the recent Seventh Circuit decision in *Bichan v. Chemetron Corp.*, ... F.2d ..... (7th Cir. 1982), decided June 25, 1982, holding that an employee who alleges wrongful discharge and a boycott of his services in furtherance of an alleged price-fixing conspiracy does *not* have standing to bring a private treble damage action against his employer under Section 4.[21] With respect to the holding of the majority below, the Seventh Circuit stated:

> We reject the *Crocker* holding. We believe Judge Kennedy's dissent, maintaining that, under sound anti-

---

[19]Antitrust and Trade Regulation Report, Volume 43, No. 1073, July 15, 1982 (Highlights Page).

[20]At least four district court decisions dealing with the issue of employee standing have been handed down since the Ninth Circuit's decision. In two cases, the district court rejected the Ninth Circuit's rationale. *Callahan v. Scott Paper Co.*, No. 81-3786, 43 ATRR 199 (E.D. Pa. 1982), decided June 14, 1982; *Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982), decided April 28, 1982. In one, the court expressed a favorable view of the Ninth Circuit's decision but found it contrary to controlling decisions in the Third Circuit and this Court. *McNulty v. Burden*, No. 76-3952, 43 ATRR 10 (E.D. Pa. 1982), decided June 22, 1982. In the fourth, the court held that the employee had standing, although it was uncertain whether he had stated a valid antitrust claim. *Shaw v. Russell Trucking Line, Inc.*, No. 81-1852, 43 ATRR 198 (W.D. Pa. 1982), decided June 30, 1982.

[21]1982-2 CCH Trade Cases ¶64,807. Because the *Bichan* court expressly recognized the conflict between its opinion and that of the majority below, its opinion was circulated among all judges in regular active service on the court, pursuant to Seventh Circuit Rule 16. Slip Opinion at 1.

> trust principles, a marketing director whose injury has nothing to do with the alleged anticompetitive conduct of price fixing has not sustained an "antitrust injury," is the more reasoned analysis, and we adopt it here.
>
> We . . . are convinced that in fashioning the antitrust laws Congress was concerned with competition, not employee coercion or discharge.[23]

The Seventh Circuit's decision in *Bichan* was predicated upon the court's use of the well-established "target area" test of antitrust standing. In contrast, the decision below was predicated upon the majority's explicit rejection of that standard and adoption in its place of an amorphous "public policy" standard which has great potential for encouraging litigation, producing essentially *ad hoc* results, burdening the courts with a myriad of treble-damage suits by parties with at best tangential antitrust injuries, and extending federal antitrust juridiction into areas within the traditional domain of state law. The majority's use of this vague new standard to determine whether respondent would be permitted to seek antitrust relief places the decision below into conflict not just with the Seventh Circuit decision in *Bichan*, but also with decisions in the First,[24] Second,[25] Fifth,[26] Eighth,[27] and Tenth[28] Circuits endorsing the target area approach.

---

[23]Slip Opinion at 9.

[24]*See Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 17-19 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980).

[25]*See Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

[26]*See Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1362 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

[27]*See Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, 368 F.2d 679, 688-89 (8th Cir. 1966) (Blackmun, J.).

[28]*See Reibert v. Atlantic Richfield Co.*, 471 F.2d 727, 731-32 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973).

Last Term, in *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723 (1982), this Court indicated its agreement with the trend of decisions in the courts of appeals that persons "tangentially affected" by an antitrust violation—persons whose injuries are "too remote from the violation and the purposes of the antitrust laws"—should not be permitted to maintain a Section 4 action.[18] In light of the facts presented in *McCready*, however, the Court had no occasion to delineate the precise parameters of the "remoteness" doctrine or to resolve the conflict among the circuits as to the correct method of determining which parties or interests are too tangentially affected. *McCready* was a class action suit brought by customers of the alleged conspirators to recover out-of-pocket loss caused directly and immediately by the defendants' refusal to reimburse its insurance customers for certain professional services. *McCready* was not an action by shareholders, corporate officers, creditors, suppliers, subcontractors, or employees—persons whose right to sue by virtue of their relationships with violators have been severely limited by lower court decisions employing the target area test.[19] The present action—a suit by an employee claiming to have been injured by his employer's alleged price-fixing conspiracy and seeking to recover for the alleged loss of employment opportunities in the years following his resignation—squarely presents the issues, left unresolved by *McCready*, of where and how the line should be drawn in defining "remote" antitrust injury.

Equally as troublesome as the novel antitrust standing test adopted by the court below is its ruling reversing the district court's summary judgment against respondent's employee boycott claim. In holding that respondent could proceed on the claim of a subsidiary conspiracy to boycott his employment services—notwithstanding uncontro-

---

[18] 50 U.S.L.W. at 4726.

[19] *See generally* Areeda and Turner, *Antitrust Law* ¶¶ 334-341 (1978).

verted evidence that he resigned, he did not seek re-employment, and no boycott actually existed—the court below held that the bare existence of a price-fixing conspiracy, in and of itself, supports the inference of "an understanding that any non-cooperating employee . . . would be removed from his or her position and would not be rehired."[50] If allowed to stand, this ruling would automatically convert every price-fixing or other antitrust conspiracy into a subsidiary conspiracy to boycott allegedly nonsupportive employees.

Thus, even if this Court were to agree with the Seventh Circuit and reject the Ninth Circuit's new antitrust standing doctrine, employees and others with fringe interests in antitrust cases would still be allowed to bring Section 4 actions through the back door by virtue of the Ninth Circuit's inference that all antitrust conspiracies encompass a boycott of non-cooperating employees. Such an inference is contrary to decisions of this Court and other courts of appeals holding that an inference of an antitrust conspiracy must be based, if at all, on evidence of consciously parallel conduct probative of the conspiracy, and that it is impermissible to draw an inference of the existence of one conspiracy based on no evidence other than the existence of an allegedly related conspiracy.[51] Moreover, the court's reliance on such an inference to reverse a grant of summary judgment is contrary to the rule established by this Court in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), that summary judgment is appropriate—indeed, mandatory—where an antitrust plaintiff fails to come forward with a *factual* showing in support of his allegations of an antitrust violation. This Court should not permit this illegitimate means of circumventing the proper limits of antitrust standing.

Crocker respectfully submits that this Court should grant certiorari in this case to resolve the conflict among

---

[50]Appendix A at 25.

[51]*See* text accompanying notes 58-59 *infra*.

the Circuits on the proper test for antitrust standing; to provide guidance to lower courts and counsel where the line should be drawn in resolving the question of "remote" antitrust injury; and to prevent the unjustified expansion of treble damage litigation fostered by the Ninth Circuit's unworkable "balancing of policy considerations" test and its unwarranted automatic inference of employee boycott.

I

THE COURT OF APPEALS DECISION IS IN DIRECT CONFLICT WITH STANDING DECISIONS OF THE COURTS OF APPEALS IN OTHER CIRCUITS

The Seventh Circuit and other courts applying a target area analysis to an allegedly blacklisted employee have found that the employee lacked standing under Section 4 of the Clayton Act,[9] whereas the court below, applying a "public policy" standard created especially for this case, held that respondent could maintain a Section 4 action. Thus, the question squarely presented for resolution by this Court is which of the *clearly conflicting* circuit court approaches should be utilized to differentiate claims remediable under Section 4 from peripheral claims not within the ambit of federal antitrust law.

The leading case employing a target area analysis to an employee claim is *Bichan v. Chemetron Corp.*, ... F.2d ..... (7th Cir. 1982).[10] The plaintiff in *Bichan* was a salaried

---

[9] *See, e.g., Bichan v. Chemetron Corp.*, ... F.2d ... (7th Cir. 1982), *affirming Bichan v. Chemetron Corp.*, 1981-2 CCH Trade Cases ¶ 64,293 (N.D. Ill. 1981); *Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982). *Cf. McNulty v. Borden*, No. 76-3952, 43 ATRR 10 (E.D. Pa. 1982); *Callahan v. Scott Paper Co.*, No. 81-3786, 43 ATRR 199 (E.D. Pa. 1982).

[10] 1982-2 CCH Trade Cases ¶ 64,807. Prior to the Seventh Circuit decision in *Bichan*, a district court within that circuit had similarly decided not to follow the decision below. *See Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982), in which the court stated: "[A]s Judge Kennedy's strong dissent notes, the *Ostrofe* decision is a striking departure from established precedent in its own,

executive allegedly terminated from his position as president of Chemetron's Industrial Gas Division and thereafter blacklisted by the industrial gas industry because of his refusal to adhere to an alleged conspiracy by his employer and its competitors to fix prices, allocate customers, and impose illegal sale conditions on customers. The plaintiff employee argued that having lost salary and bonuses as a direct result of his refusal to participate in the alleged conspiracy, he had suffered an antitrust injury within the meaning of Section 4 of the Clayton Act. The Seventh Circuit, expressly rejecting the analysis and reasoning of the Ninth Circuit in *this* case, held that the plaintiff could *not* maintain the action because he was *not within the target area* of the alleged anticompetitive conduct—the industrial gas market as opposed to the labor market—and had *not* alleged an *antitrust* injury of the type the antitrust laws were intended to prevent.[34]

In sharp contrast to the Seventh Circuit decision, the court below held that respondent had alleged an "antitrust injury" and could maintain a Section 4 action because his alleged injury was "within the core of Congressional concern underlying the substantive provisions of the antitrust laws allegedly violated."[35] The *Bichan* court rejected this

---

and this circuit. Without an indication that the Seventh Circuit would join in this departure, this Court will not presume to alter this circuit's settled approach." *Perry* holds that a *state* suit for wrongful discharge, not federal or state antitrust violations, is the proper avenue of pursuit for an employee claiming discharge for refusal to engage in business practices violative of federal antitrust law.

[34]The district court for the Eastern District of Pennsylvania has similarly rejected the analysis below, stating "[it is] manifest that the antitrust laws were not designed to protect [employees] from the type of injury for which compensation is sought here." *Callahan v. Scott Paper Co.*, No. 81-3786, 43 ATRR 199 (E.D. Pa. 1982).

[35]Appendix A at 22. The majority below relied in part upon *Radovich v. National Football League*, 352 U.S. 445 (1957), for its holding that respondent had standing to challenge the alleged

conclusion as well as the policy rationale upon which it was based:

> [W]e are convinced that in fashioning the antitrust laws Congress was concerned with competition, not employee coercion or discharge. . . .
>
> We decline to usurp the legislative role and rewrite the treble damages provision to extend antitrust protection beyond that dictated by established precedent and Congressional intent. . . .
>
> [W]e do not believe Bichan is the proper party to bring a treble damages action because his injury is simply too remote from the alleged illegal conduct. . . .
>
> While Bichan may seek to vindicate his interests in the state courts, he may not maintain a § 4 treble damages action in federal court.[36]

The Seventh Circuit's approach to assessing which alleged injuries are too remote to justify antitrust standing is, Crocker submits, the correct one.[37] The vague standard

---

price-fixing conspiracy even though his alleged injury, as impliedly acknowledged by the majority, "did *not* result from the restraint on competition that was the principal object of the conspiracy." Appendix A at 8. According to the majority, "[t]he present case is indistinguishable from *Radovich*." *Id.* at 9. The majority's reliance upon *Radovich*, however, was misplaced. The central purpose of the alleged conspiracy in *Radovich* was to prevent *the free interchange of employees* in the football industry, whereas the conspiracy alleged by respondent sought to restrain competition *among label manufacturers*. The allegation of blacklisting in *Radovich* does not support respondent's standing to sue herein because *Radovich* involved a clearly defined *group boycott aimed at employees*, whereas the employment market was *not the target* of Crocker's alleged price-fixing. The majority's reliance on *Radovich* in the decision below poses yet another conflict with the Seventh Circuit decision in *Bichan*, which expressly rejected the argument that *Radovich* supports respondent's position. Slip Opinion at 6-7.

[36]Slip Opinion at 9-11.

[37]The target area approach taken by the Seventh Circuit in *Bichan* is the same approach taken by the First, Second, Fifth, Eighth, and Tenth Circuits to determine whether a plaintiff who alleges an

adopted by the Ninth Circuit majority below is not based on the statutory language of Section 4, and has great potential for unreasonably expanding federal antitrust jurisdiction into the law of employer-employee relations, and wrongly encouraging costly antitrust litigation by fringe litigants lured by the potential of treble damages and attorney's fees awards. The competing policy interests cited by the panel majority to be balanced—"the interests in effective enforcement of the antitrust laws [and] the interests in avoiding vexatious litigation and excessive liability"—are of little guidance to trial courts who are mandated by Section 4 to determine whether the plaintiff has alleged injury "by reason of" something forbidden in the antitrust laws. In sharp contrast to the clearly defined and concrete factors utilized by the majority of circuits to determine antitrust standing—including assessment of the market in which the defendant operates, the nature of the anticompetitive conduct complained of, the market in which that conduct is directed to impair competitive conditions, and the nature of the injury suffered by actors within that market—the policy interests which the majority suggests balancing are impossible of consistent application, and accord potential litigants no reasonable basis for predicting the applicability of Section 4. The result is a chimera rather than a test; a standard without standards.

The inherent fallibility of the panel majority's *ad hoc* balancing approach is demonstrated by its own analysis in this case. The majority asserted effective enforcement, deterrence, and the need to provide a meaningful remedy as grounds for granting respondent standing. Yet the record herein reveals that respondent waited three and one-half years to file suit, demonstrating not an attempt by respondent to enforce the antitrust laws or deter Crocker

---

injury peripheral to an antitrust violation will be permitted to seek antitrust recovery. *See* notes 23-27 *supra*. The rejection by the majority below of the target area test thus places the decision below into conflict with decisions in those circuits as well.

from further allegedly illegal activities, but rather an attempt to jump on the "antitrust bandwagon" two years after customers had already brought suit in a national class action.[38] This case presents exactly the situation of multiple lawsuits against the same defendant that the target area rule was designed to prevent, a situation which the majority's *ad hoc* approach fails to rectify.

Moreover, respondent's alleged injury was not without remedy, as respondent had available a perfectly adequate *tort* remedy under state law for compensatory and punitive damages for wrongful discharge, a remedy which other courts have characterized as the *proper* avenue of pursuit for an employee claiming wrongful discharge for a refusal to engage in business practices violative of federal antitrust law.[39] The expansion of federal antitrust jurisdiction contained in the majority approach thus undermines the concept of federalism by turning the federal antitrust laws into a tort remedy for injury of a kind traditionally dealt with by state law.[40] Such an intrusion into the domain of state law should be impermissible absent full considera-

---

[38]*See* note 2 and accompanying text *supra*.

[39]*See, e.g., Tameny v. Atlantic Richfield Company*, 27 Cal.3d 167 (1980); *Bichan v. Chemetron Corp.*, Slip Opinion at 11; *Perry v. Hartz Mountain Corp.*, note 33 *supra*.

[40]Numerous courts have recognized that not all business wrongs are within the reach of the antitrust laws. *See, e.g., Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 289 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979) (unilateral conduct designed to combat competitive inroads into manufacturer's servicing business held to be at best a garden variety business tort reachable under state law, not one cognizable under § 1 of the Sherman Act); *George R. Whitten Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 560 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975) (numerous policy reasons compel restraint against extending *per se* classification to the kinds of competitive business torts traditionally dealt with by state law); *Kestenbaum v. Falstaff Brewing Corp.*, 575 F. 2d 564, 570-71 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (the Sherman Act is not the panacea for all b[illegible] affronts; its purpose is to remedy public injury, or injury to competition, as distinguished from private injury).

tion by this Court of the implications and ramifications of the expansion.

This Court should grant certiorari to resolve this conflict among the circuit courts, to preclude further use of federal antitrust law as a remedy for common business affronts reachable under state tort law, and to prevent "enlargement of the [Section 4] weapon to a caliber far exceeding that contemplated by Congress."[41]

II

McCREADY DID NOT DECIDE THE LIMITS OF ANTITRUST STANDING; THIS CASE PRESENTS THE PERFECT OPPORTUNITY TO DO SO

In *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723 (1982), this Court reviewed its prior standing decisions and reaffirmed its earlier conclusions that the potency of the antitrust remedy implies the need for care in the application of Section 4 of the Clayton Act. Stating "[i]t is reasonable to assume that Congress did not intend to allow every person *tangentially affected* by an antitrust violation to maintain an action to recover threefold damages," the Court held that where the threat of duplicative recovery is not involved, the proper focus of inquiry for determining whether a plaintiff lacks antitrust standing is whether the plaintiff's alleged injury is "too *remote* from the violation and the *purposes* of the antitrust laws to form the predicate for a suit under § 4."[42] Because *McCready* involved suit by an economically injured consumer clearly within the area of the economy endangered by the breakdown of competitive conditions, the Court had no occasion to analyze which types of relationships or injuries will not give rise to an antitrust action despite an apparent connection with an alleged antitrust violation. This case presents the Court with such an opportunity.

---

[41] *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d at 1295.

[42] 50 U.S.L.W. at 4726 (emphasis added).

The concerns which led the Court to grant McCready standing have no application to the facts of this case, and demonstrate why this case would be an appropriate one to pair with *McCready* to define the line that separates "tangentially affected" persons from those permitted to sue under Section 4. The first concern expressed by the Court was that there be a clear economic nexus between the alleged violation and the harm to plaintiff. McCready, a consumer of unreimbursed psychotherapeutic services, clearly demonstrated such a nexus by alleging a direct out-of-pocket loss suffered as of the moment Blue Shield's alleged antitrust conspiracy impacted her. Her loss was ascertainable "to the penny," and was "so integral an aspect of the conspiracy alleged" as to be "*precisely* 'the type of loss that the claimed violations . . . would be likely to cause.' "[13] In contrast, respondent's claim rests not on any tangible economic injury suffered at the time he chose to change occupations and become a stockbroker, but on the speculative damage theory that, as time progressed, he would have *earned more* had he remained employed in the label manufacturing industry. Crocker submits that such a loss is not of the type illegal price-fixing, bid-rigging, or customer allocation conspiracies are likely to cause, and that recovery under such a damage theory would be entirely fortuitous, depending not on the concrete economic impact of an alleged antitrust violation, but on the chance that the plaintiff would not be successful in his new *chosen* endeavors.

The second concern expressed by this Court in *McCready* was that the alleged injury reflect Congress' "core concerns" in prohibiting the antitrust conduct. As applied to this case, the question would be whether the injury alleged by respondent—loss of employment opportunities—reflects Congress' motivation when it chose to prohibit price-fixing,

---

[13] *Id.* at 4725 n. 11 and 4728 (emphasis added).

bid-rigging, and customer allocation conspiracies. Clearly it does not."

In *McCready*, Blue Shield's alleged anticompetitive scheme was condemned because it restrained competition in the market for psychotherapeutic services. As a customer in that market, McCready suffered direct out-of-pocket loss by reason of the alleged restraints placed by Blue Shield on reimbursement. In turn, Blue Shield profited directly by its refusal to reimburse McCready for the psychotherapy she received. McCready's resultant injury (an increase in the net cost to her of the psychotherapeutic services of her choice) thus directly reflected the *reason* Blue Shield's conduct was unlawful. Price-fixing and customer-allocation conspiracies are condemned because they artificially force *customers* to pay higher prices than would be found in a competitive market, and because they reduce the ability of non-conspiring *competitors* to compete in a free market. Were respondent a customer of paper lithograph labels forced by Crocker's alleged price-fixing conspiracy to pay higher prices, his injury clearly would reflect Congress' concern over the breakdown of competitive market conditions. Similarly, were respondent a non-conspiring competitor injured in his ability to compete, respondent would be able to demonstrate an injury flowing from "that which is unlawful in the defendant's conduct."[9] But respondent is neither an economically injured customer nor a competitor

---

[8]This fact was recognized by the Seventh Circuit in *Bichan*, Slip Opinion at 9, and by Judge Kennedy below: "The congressional concern underlying the substantive provisions of the antitrust laws was competition, not employee coercion or discharge." Appendix A at 41.

[9]In footnote 19 of *McCready*, the Court affirmed "that the relationship between the claimed injury and that which is unlawful in the defendant's conduct . . . is [a] factor to be considered in determining the redressability of a particular form of injury under § 4." 50 U.S.L.W. at 4727 n. 19.

of Crocker.[46] He is simply an *employee* who allegedly chose to change occupations rather than participate in his employer's claimed illegal conduct, and who took no demonstrable steps thereafter to seek further employment in the industry.

To deny antitrust standing to persons in respondent's position would not frustrate the purposes of Section 4. This Court recognized in *McCready* that the two basic objectives of the private enforcement scheme embodied in Section 4 are deterrence and the desire to provide a remedy to injured persons who otherwise would be without recompense.[47] "Only by requiring violators to disgorge the 'fruits of their illegality' can the deterrent objectives of the antitrust laws be fully served."[48] In *McCready*, had the class of consumers which plaintiff represented not been granted standing, the funds which Blue Shield realized by means of its non-reimbursement policy might never have been subject to challenge. That is not the case here. Crocker has already settled a class action brought by customers of paper labels.[49] Similarly, unlike McCready,[50] respondent was not without remedy. Respondent's alleged injury—wrongful discharge—was remediable under state tort law.[51]

All told, it is inconceivable to think that one of Congress' objectives was to provide a remedy in the antitrust laws for wrongful discharge. This Court should grant certiorari

---

[46]The Seventh Circuit in *Bichan* expressed the opinion that *only* persons "who, as consumers or competitors, suffer immediate injuries with respect to their business or property" should be permitted to impose the "deterrent sting" of treble antitrust damages. Slip Opinion at 11.

[47]50 U.S.L.W. at 4725 and n. 10.

[48]*Id.* at 4725 n. 10.

[49]*See* note 2 and accompanying text *supra*.

[50]"[I]n addition to allowing Blue Shield to retain a palpable profit as a result of its unlawful plan, denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct." 50 U.S.L.W. at 4725 n. 10.

[51]*See* note 39 and accompanying text *supra*.

to place this case in contraposition with *McCready*, and define by way of example how the bar and bench are to identify which types of injuries are so tangential to the purposes of the antitrust laws that the persons who allegedly have suffered them will be denied *antitrust* standing.

III

THE COURT OF APPEALS DECISION IMPERMISSIBLY USES AN INFERENCE OF CONSPIRACY, IN LIEU OF EVIDENCE, TO REVERSE A PROPER GRANT OF SUMMARY JUDGMENT

The majority below held that a former employee may defeat a motion for summary judgment in an action for conspiracy to boycott his services under Section 4 of the Clayton Act *by relying solely on an unsupported inference of the likelihood of a boycott* drawn from the alleged existence of a price-fixing conspiracy in a product market. This decision is equally as troublesome as the majority's standing decision. The decision holds that in *every* case involving an alleged antitrust conspiracy there may be *inferred* a subsidiary conspiracy to boycott non-cooperating employees, and therefore that in response to a factual showing upon motion for summary judgment that no boycott exists, an employee need not present any evidence probative of the existence of the alleged boycott apart from evidence of an alleged conspiracy to fix prices.

This unsupported and sweeping decision is contrary to decisions of this Court and of other Courts of Appeals and has serious consequences for the judicial system as a whole. It effectively circumvents the question of whether a discharged employee has standing to challenge his employer's price-fixing conspiracy by allowing the employee to allege a subsidiary boycott of his services, the existence of which will then be *inferred* upon a defense motion for summary judgment. *The decision thus would permit any employee to go to trial on a subsidiary boycott claim merely by advancing evidence that his or her employer participated in a*

price-fixing conspiracy. The result, of course, is further encouragement of burdensome and expensive antitrust litigation by persons with at best fringe interests in the alleged substantive conspiracy, as demonstrated by the facts of this case.[22]

In support of its 1977 motion for summary judgment, Crocker made a comprehensive evidentiary showing that no conspiracy to boycott respondent's services had ever existed. Respondent himself admitted that he voluntarily resigned from his employment with Crocker in 1970 to accept a job in an unrelated field, and that he never applied for a position with any other label manufacturer. Deposition testimony from the appropriate executive officers of three of Crocker's alleged co-participants in the alleged boycott was filed in support of the motion for summary judgment; in each case they testified that had respondent applied for a job with the deponent's company, he would have received full consideration on the same basis as any other applicant, and that no boycott existed. In response to this extensive showing, respondent failed to produce any affidavits or other evidence of a conspiracy to boycott his services.[23] Accordingly, as required by Rule 56(e), an

---

[22]This Court has previously expressed considerable concern that vexatious antitrust lawsuits not be encouraged. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("District Courts must be especially alert to identify frivolous claims brought to extort nuisance settlements."); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 478 (1962) (J. Harlan, dissenting) ("[H]aving regard for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation, and the inordinate amount of time that such cases sometimes demand of the trial courts, there is good reason for giving the summary judgment rule its full legitimate sweep in this field.").

[23]In an affidavit filed in 1975, respondent identified certain acts and statements in support of his claim that a price-fixing conspiracy existed among label manufacturers. These acts and statements are, however, of no avail to respondent on the claim on which he seeks relief: that there existed a *boycott aimed at respondent himself*, the object of which was to exclude him from employment. In response

experienced trial judge (now judge of the court of appeals) granted summary judgment in favor of Crocker with respect to the boycott claim.[54]

The majority below reversed, holding that if an employee puts forth some evidence that his employer was a participant in a price-fixing conspiracy, he need not come forward with *any* further evidence to overcome a motion for summary judgment on a claim that his employer was part of a conspiracy to boycott the services of employees who failed to cooperate in the price-fixing arrangement. The stated reason for this result was the majority view that the trier of fact should, if it so chooses, be permitted to find that such a boycott existed on the basis of a "reasonable inference."[55] Crocker respectfully submits, however, that the leap from evidence that a defendant participated in a price-fixing conspiracy to the conclusion that a second conspiracy to boycott non-cooperating employees existed is sheer speculation insufficient to raise a triable issue of fact. The "inference" suggested by the majority below cannot substitute for evidence required to overcome a motion for summary judgment.[56] As Judge Kennedy said in dissent below, "An unsupported inference of a boycott is not sufficient."[57]

The decision below is squarely at odds with this Court's holding in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) that once the allegations of

---

to the 1977 motion for summary judgment, respondent put forward no affidavits and identified no specific acts, statements or facts supporting his claim of the existence of this boycott, essentially conceding that his claim rested on assumption and conjecture. *See* notes 12-13 *supra*.

[54]The Honorable Cecil F. Poole, U.S. Court of Appeals for the Ninth Circuit. *See* note 13 *supra*.

[55]Appendix A at 25.

[56]This Court has stated, "Speculation cannot supply the place of proof." *Moore v. Chesapeake & Ohio Railway Co.*, 340 U.S. 573, 578 (1951).

[57]Appendix A at 45.

conspiracy made in an antitrust complaint are rebutted by evidence of the non-existence of the conspiracy, summary judgment for defendant should be granted unless plaintiff comes forth with *significant probative evidence* tending to support the claim. A *factual* showing is what is required, not mere speculation. Fed. R. Civ. P. 56(e).

Decisions of this and other courts have made it clear that proof of one antitrust conspiracy is not sufficient to support the existence of another conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 543-44 (1954); *Golf City, Inc. v. Wilson Sporting Goods Co., Inc.*, 555 F.2d 426, 435 (5th Cir. 1977).[58] If an inference of an antitrust conspiracy is to be drawn at all, it must *start* with evidence of *consciously parallel conduct* probative of the conspiracy. *See American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).[59]

There is no dispute that, on the record in this case, there has been absolutely no showing of parallel conduct with respect to respondent's employment by any of the alleged co-conspirators. By allowing an unsupported inference of boycott with no evidence of parallel conduct, the majority below has not only undermined the substantive law dealing with the inference of conspiracy but, in essence, made Rule 56 of the Federal Rules of Civil Procedure inapplicable to this type of case. The decision thus creates yet another conflict with decisions of other courts of appeals which have followed *Cities Service* and denied antitrust plaintiffs the right to proceed to trial where the defen-

---

[58] *See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F.Supp. 1100, 1101 (E.D. Pa. 1981).

[59] Recent circuit court decisions discussing the inference of conspiracy all begin their inquiry with demonstrated parallel business behavior. *See Tose v. First Pennsylvania Bank*, 648 F.2d 879, 894 (3d Cir.), *cert. denied*, 102 S.Ct. 390 (1981); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981), *cert. denied*, 102 S.Ct. 1610 (1982).

dant's evidentiary showing was countered by no more than speculative or circumstantial evidence.[40] Accordingly, this Court should grant the writ of certiorari to vacate the decision of the court of appeals and make clear the continuing authority of *Cities Service* that antitrust plaintiffs who allege a boycott of their services must come forward on motion for summary judgment with more than mere conjecture to support their allegations.

---

[40]*See, e.g., Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d at 462 (7th Cir. 1981) (affirming grant of summary judgment in a price-fixing suit where after years of discovery plaintiffs had produced no evidence affirmatively supporting their theory; in light of the defendants' showing by way of affidavit and deposition, the court of appeals ruled that plaintiffs could not rely on circumstantial evidence to create an inference of conspiracy). *See also Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 839-40 (2d Cir. 1980); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1080 (3d Cir. 1978); *Tripoli Co. v. Wella Corp.*, 425 F. 2d 932, 935-36 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970); *Natrona Service, Inc. v. Continental Oil Co.*, 598 F.2d 1294 (10th Cir. 1979).

CONCLUSION

For the foregoing reasons, Crocker respectfully submits that the petition for certiorari should be granted.

Dated: August 2, 1982

Respectfully submitted,

JAMES T. FOUSEKIS
(Counsel of Record)
LEO L. FINKELSTEIN
STEINHART & FALCONER
Attorneys for Petitioner
H. S. Crocker Company, Inc.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 77-3985

FRANK J. OSTROFE,

Plaintiff-Appellant

v.

H.S. CROCKER COMPANY, INC.,

Defendant-Appellee.

OPINION

Appeal from the United States District
for the Northern District of
California
Honorable Cecil F. Poole, District Judge,
Presiding.

Argued and Submitted March 20, 1980
Decided March 8, 1982

OPINION

Before BROWNING, Chief Judge, KENNEDY and SKOPIL, Circuit Judges.

BROWNING, Chief Judge:

The principal issue presented by this appeal is whether under the circumstances of this case a sales manager, forced to resign because he refused to participate in an alleged scheme by his employer and other manufacturers to fix prices, rig bids, and allocate markets, has standing to bring a private treble damages action against his employer under Section 4 of the Clayton Act. We hold that he does.

I.

Frank J. Ostrofe, former marketing director of H.S. Crocker Company, Inc., filed a complaint against Crocker seeking damages for injuries resulting from a violation of the Sherman Act. The complaint alleged the following: Crocker and other unnamed manufacturers of paper lithograph labels combined and conspired to unreasonably restrain interstate trade and

commerce in labels in violation of Section 1 of the Act. The conspiracy consisted of a continuing agreement and concert of action among the manufacturers to fix and maintain label prices, submit rigged bids, allocate customers and territories, and "boycott those persons, including plaintiff, who have interfered or threatened to interfere with their illegal plan."[1/] The conspiracy was effectuated in part by coercing Ostrofe, as Crocker's sales manager, to rig bids, fix prices, and allocate markets. When Ostrofe refused to cooperate Crocker's co-conspirators complained to Crocker's executive officers who warned Ostrofe that if he did not participate in the illegal scheme he would be discharged and prevented from participating in the label industry in the future. Ostrofe was repeatedly told he would not receive promised financial compensation or a greater future share in Crocker's management or income unless he stopped interfering with the unlawful scheme. He was forced by these threats to resign his

position with Crocker, and was boycotted from further employment in the labels industry.

Crocker moved to dismiss on the ground Ostrofe lacked "standing" to sue for damages under Section 4 of the Clayton Act. The district court granted the motion in part, holding Ostrofe could not attack the agreement to fix prices because he was not the "target" of that agreement. The court said, "[T]he conspiracy was directed not at plaintiff or other employees in any anti-competitive sense or even at his employer, but only at competitors of the conspirators in the lithograph label market. Any effect upon plaintiff was not an effect of the alleged anti-competitive conduct but at most an alleged incidental effect upon an employee who eventually refused to continue participation in the conspiracy."

The Court noted, however, that the complaint also alleged an understanding among Crocker and the other label manufacturers to boycott Ostrofe and others who interfered with

the price fixing activities, and held that Ostrofe had standing to challenge this "separate" conspiracy. The court therefore denied the motion to dismiss with respect to this claim "without prejudice, however, to a properly documented motion for summary judgment presenting the [boycott] issue."

Crocker filed a motion for summary judgment supported by depositions and affidavits negating the existence of any agreement among label manufacturers not to employ plaintiff. In opposition to the motion, Ostrofe offered affidavits supporting his allegations that other label manufacturers had complained to Crocker about Ostrofe's failure to implement the price-fixing agreement, that Crocker had threatened Ostrofe with reprisals if he did not participate in the price-fixing scheme, and that these threats had forced Ostrofe's resignation from Crocker. Crocker responded, in part, that Ostrofe's evidence related to activities that had allegedly occurred prior to Ostrofe's resignation, and

therefore "do not relate to the claimed boycott but rather to the alleged price fixing conspiracy, as to which [Ostrofe] has no standing to complain."

While the motion for summary judgment was pending, Ostrofe moved to amend the complaint to specifically allege a unilateral refusal by Crocker to deal with Ostrofe. The proposed amendment alleged that the "conspiracy to fix prices . . . and allocate markets has been effectuated in part by defendant [Crocker] terminating plaintiff as a national sales manager for paper labels when plaintiff failed to co-operate in the aforesaid conspiracy." The district court denied the motion to amend, stating, "To allow the proposed amendment would, in effect, be to allow [Ostrofe] to complain of the alleged price-fixing conspiracy, since [Ostrofe] would be required to show at trial the existence of such a conspiracy in order to prove that the unilateral action was unlawful. If we were to allow the amendment, we would be granting [Ostrofe] standing to complain of the price-fixing conspiracy, which was previously denied."

The district court later granted the motion for summary judgment without opinion, and dismissed the action.

II.

The district court erred in deciding Crocker's motions to dismiss and for summary judgment as if Ostrofe's claim consisted of two separate and unrelated lawsuits -- one challenging a conspiracy to fix prices and allocate customers for paper lithograph labels, the other attacking an agreement to terminate and bar Ostrofe from employment in that industry.

It is axiomatic that the allegations of a complaint must "be read as a whole, and . . . viewed broadly and liberally." Wright and Miller, 5 Fed. Practice and Procedure, 657. The same view must be taken of plaintiff's proof: "In cases such as this, plaintiff should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ' . . .[T]he character and

effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.'" Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).[2/]

The fragmentation of Ostrofe's pleading and proof lead to erroneous rulings on the motions to dismiss, to amend the complaint, and for summary judgment.

A. Motion to Dismiss

The court treated the motion to dismiss for lack of standing as if the question presented were whether a price fixing conspiracy could be challenged by an employee whose discharge was an incidental effect and not the object of that conspiracy. But the complaint alleged that Ostrofe was discharged and barred from further employment pursuant to a boycott agreement entered into as a part and in furtherance of the price-fixing conspiracy.

As the district court recognized, the boycott aimed at Ostrofe was a violation of the

Sherman Act in itself, and Ostrofe had standing under Section 4 to seek damages for the injuries it allegedly caused him.[3/] The court cited no authority for denying Ostrofe the right, in pursuing his remedy, to establish the context of the larger conspiracy of which the boycott was allegedly a part and from which it drew its purpose. Persons injured by an agreed-upon refusal to deal employed as a part of a conspiracy to restrain or monopolize trade and commerce have been permitted to challenge the conspiracy as a whole even though their injuries did not result from the restraint on competition that was the principle object of the conspiracy. Radovich v. National Football League, 352 U.S. 445 (1957); Kiefer-Stewart Co. v. E. Seagram & Sons, Inc., 340 U.S. 211 (1951). Solinger v. A. & M. Records, Inc., 586 F.2d 1304 (9th Cir. 1978); Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967); Standard Oil Co. of Calif. v. Moore, 251 F.2d 188 (9th Cir. 1957).[4/] Evidence of the underlying conspiracy

is clearly probative of the existence of a boycott employed in furtherance of the conspiracy.

In Radovich plaintiff alleged that pursuant to an agreement among the defendants he was boycotted and blacklisted because he played for a professional football league competitive with defendant's league. The boycott was alleged to have been part of a conspiracy to monopolize professional football in the United States in violation of Sections 1 and 2 of the Sherman Act. The player boycott was employed as a means of destroying the rival league. Plaintiff was allowed to challenge the conspiracy to monopolize of which the boycott was a part. The present case is indistinguishable from Radovich.

B. Denial of Leave to Amend the Complaint

It is a more difficult question whether Ostrofe also had standing to sue Crocker for damages under Section 4 on the theory of the case presented in Ostrofe's proposed amendment; that is, that Crocker unilaterally discharged

Ostrofe as a means of effectuating the scheme to fix prices and allocate customers.

Parties injured by unilateral conduct in furtherance of an unlawful restraint of trade have been permitted to challenge the overall scheme.[5/] But Crocker argues that it would extend liability too far to allow standing to sue for treble damages under Section 4 to persons injured only by a refusal to deal by a single conspirator in furtherance of a price-fixing conspiracy.

Section 4 limits standing in a private antitrust action for treble damages to a "person injured in his business or property by reason of anything forbidden in the antitrust laws." The courts have devised various "tests" for standing to sue designed to limit the expansive liability that might flow from a literal interpretation of the statute.[6/] While not without utility, these "tests" have led to varying, inconsistent, and unpredictable results.[7/] Although sufficient to resolve clear cases, less obvious cases require

a balancing of competing policy interests, principally the interest in effective enforcement of the antitrust laws against the interest in avoiding vexatious litigation and excessive liability.[8/]

On one hand, private treble damages actions under Section 4 constitutes a "bulwark of antitrust enforcement" by "insuring that the private action will be an ever-present threat to deter any one contemplating business behavior in violation of the antitrust laws." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).[9/] Thus Section 4 was "intended not merely to redress a personal injury, but to aid in achieving the broader purposes of the antitrust laws." Comment, "Standing to Sue for Treble Damages Under Section 4 of the Clayton Act," 64 Colum. L. Rev. 570, 571 (1964). The extent to which allowing a particular class of plaintiffs to bring suit for damages will further the enforcement purpose of Sectio. 4 is an important factor in determining

whether such plaintiffs should be allowed standing.

On the other hand, since the injurious consequences of antitrust violations may extend through large areas of the economy, the unfettered grant of standing might open the "floodgates of litigation" and "result in an over-kill, due to an enlargement of the private weapon to a caliber far exceeding that contemplated by Congress." Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2nd Cir. 1971). The extent to which these and other considerations affect the practicality and fairness of suits for treble damages by a particular class of plaintiffs must be balanced against the importance such suits may have in the enforcement of the antitrust laws.

It is unnecessary, and would be contrary to the purposes of Section 4, to erect an arbitrary and absolute bar to treble damage suits for injuries that result from a

conspirator's efforts to implement the anticompetitive aspects of the conspiracy. The interests counseling restriction of private treble damage actions may outweigh the interests of antitrust enforcement in some such cases. But the interests of antitrust enforcement may predominate in others. This is such a case.

It might be argued that such a balancing of the policy considerations will encourage litigation, burden the courts, and produce essentially ad hoc results, and that a bright-line approach, though imperfect, is therefore preferable. As the brief analysis that follows reflects, however, the significant factors are relatively few, simple, and capable of producing predictable results.

Allowing persons who are discharged for refusing to participate in antitrust violations by their employers to commence treble damage actions will advance Section 4's purpose to further enforcement of the antitrust laws in a number of significant respects.

The agreement challenged by Ostrofe had as its purpose the fixing of prices and allocation of customers in a nationwide market. Such schemes are of grave concern to antitrust enforcement, yet they are invariably covert. Covert conspiracies in restraint of trade may go undetected by the intended victims.[10/] Exposure of such schemes may depend upon encouraging disclosure by insiders. Allowing suits for treble damages by employees discharged by their employers for refusing to cooperate in the illegal scheme will encourage such disclosure. Absent such a remedy, persons in Ostrofe's position have little incentive to resist the unlawful scheme. If they take part they may be exposed to criminal liability, but detection is unlikely.[11/] If they refuse to participate, however, discharge is virtually certain and, absent a remedy under Section 4, prospects for civil recovery are poor.[12/]

No conspiracy to fix prices and allocate customers can be effective without the

cooperation of responsible employees of each competitor. Discharge of those who refuse to participate is essential to success of the scheme. Affording discharged employees standing to sue for treble damages contributes to the enforcement of the antitrust laws by enhancing potential liability for a kind of conduct each business conspirator must engage in if it is to perform its role in the conspiracy.

Moreover, the grant of standing to such persons may prevent or mitigate injury to those who are the ultimate objects of the restraint. A timely suit by an employee discharged for resisting a price fixing scheme may prevent injury to the consumer or competitor who would otherwise have been its victims. Avoiding injury to the competitive structure itself is particularly important; once destroyed, competitive conditions may be difficult to restore. See Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L. J. 809, 847 (1977).

The harm to an employee discharged by his employer for refusing to participate in effectuating an antitrust conspiracy flows immediately, not remotely or indirectly, from the employer's violation of the Act; it is neither incidental to nor derivative from injuries done to others.[13/] Thus, there is no more proximate victim who might be better qualified to bring suit for the damages sustained.[14/]

These enforcement considerations offer strong support for allowing standing to persons discharged by their employer for refusing to participate in an antitrust violation.

On the other hand, allowing such persons to sue will have none of the negative consequences that might counsel denial of standing under Section 4.

Employees discharged by their employer for declining to take part in an antitrust violation are not so numerous that recognizing their claims would threaten a flood of litigation,[15/] or impose a ruinous financial burden on

the industry.[16] There is no danger of duplicative recovery. The damages done to such an employee are done to him alone; the damages he sustains are not passed on, nor possibly included in the losses of others.[17]

The complaint in this case alleges a deliberate and continuing understanding and course of conduct of a kind long and unequivocally condemned as per se illegal under the Sherman Act,[18] and treble damages would not constitute an unfair penalty inflicted unjustifiably upon an unwary defendant.[19]

Suits for damages by persons wrongfully discharged are common; courts are accustomed to assessing such damages; they are neither unduly speculative nor difficult to calculate, obviating another source of judicial concern.[20]

Treble damages would not be a windfall to persons discharged for refusing to take part in an anti-competitive scheme; their injury is directly and intimately related to the antitrust violation, and the remedial purpose for allowing

the recovery of three times actual losses is satisfied.[21/]

Since no limiting factor countervails the compelling reasons favoring standing, the balance of competing policy considerations strongly favors allowing employees who suffer loss inflicted in retaliation for opposition to anti-competitive schemes to maintain suit.

C. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

Particular mention should be made of the Supreme Court's decision in Brunswick in relation both to the motion to dismiss and the motion to amend.

In Brunswick, operators of bowling alleys brought suit for damages allegedly resulting from the acquisition by Brunswick Corporation of bowling centers that competed with plaintiffs. The acquisitions were claimed to violate Section 7 of the Clayton Act on the theory that "because of its size, [Brunswick] had the capacity to lessen competition in the

markets it had entered by driving smaller competitors out of business." 429 U.S. at 481. Plaintiffs claimed injury on the theory that if Brunswick had not acquired the local bowling centers then local competitors would have gone out of business and plaintiffs' profits would have increased. Ibid.

The Supreme Court held that Section 4 did not authorize suit for damages for such injury. The Court pointed out that plaintiffs' injury had nothing to do with the potential anticompetitive effects that made the merger unlawful. Plaintiff's injury resulted from the preservation of competition rather than from the elimination of competition. To allow suit for such injury, the court said, "would make § 4 recovery entirely fortuitous, and would authorize damages for losses that are of no concern to the antitrust laws." 429 U.S. at 487. The damages plaintiffs sought would "provide them with the profits they would have realized had competition been reduced . . . . It is inimical to the

purpose of this law to award damages for the type of injury claimed here." 429 U.S. at 488. The Court concluded:

> it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful.
>
> We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

429 U.S. at 488-89. (Emphasis in original.)

Whether Brunswick applies to suits brought under Sections 1 and 2 of the Sherman Act is unclear;[22/] so too is the distinction between the concepts of standing and antitrust injury.[23/] In any event, the holding and

rationale of Brunswick are entirely consistent with according standing to an employee discharged for interfering with the effectuation of an antitrust violation.

Brunswick could be read as limiting Section 4 to suits for damages caused by the anti-competitive effect of the particular anti-trust violation. Similar language appears in lower court opinions.[24/] So construed, Brunswick arguably would prevent suit by Ostrofe if his injury resulted only from unilateral conduct by Crocker in furtherance of the conspiracy rather than from the elimination of competition in the marketing of Ostrofe's services or in the marketing of labels. But such a construction of Brunswick would not be justified.

The language of Brunswick must be read in light of the problem to which it was directed. Brunswick dealt with a claim based upon injury from the effect of an alleged antitrust violation upon competition. The Court was simply not concerned with a claim based upon injury stemming

from conduct in furtherance of an antitrust violation.[25/]

The central theme of Brunswick is that to be actionable under Section 4, plaintiff's injury should fall within the core of Congressional concern underlying the substantive provision of the antitrust laws allegedly violated.[26/] In outlawing price fixing and customer allocation under the Sherman Act, Congress was concerned with competitive conditions in the product market; hence competitors and perhaps consumers injured by the elimination of competition between the conspiring business concerns have standing to sue.

But Congress was also concerned with the conduct of individuals acting on behalf of conspiring economic entities. Congress imposed criminal liability upon individuals who violate the Sherman Act even though they act in a representative capacity and in discharge of the duties of employment.[27/] It cannot be said that Ostrofe's asserted loss was "of no concern to

the antitrust laws." Ostrofe was injured because of his efforts to comply with the mandate of the Sherman Act; he suffered an "antitrust injury . . . of the type the antitrust laws were intended to prevent."

Moreover, the loss did not result from increased competition, as did the asserted loss in Brunswick, but from a conspirator's efforts to realize an anticompetitive purpose. As sales manager of one of the conspiring companies, Ostrofe's cooperation was necessary to effect the illegal restraint. Crocker demanded that Ostrofe engaged in anticompetitive behavior, rig bids, sell at agreed upon prices, and deal only with customers allocated to Crocker. When Ostrofe refused, his removal was essential to the success of the scheme. These facts disclose the "intimate relationship between circumstances which make the wrongdoer's conduct unlawful and the resulting harm which is the subject of the suit," required by Brunswick. Handler, Changing Trends in Antitrust Doctrines: An

Unprecedented Supreme Court Term - 1977, 77 Colum. L.Rev. 979, 990 (1977).[28/]

D. Motion for Summary Judgment

The court apparently treated the motion for summary judgment as if the question were whether, excluding evidence of an understanding among the manufacturers to fix prices and allocate customers and of the relationship between that understanding and Ostrofe's discharge, there remained sufficient evidence to raise a genuine issue of fact as to the existence of an agreement among the manufacturers to boycott Ostrofe.

The result of the district court's fragmentation of the scheme alleged in Ostrofe's complaint was to deny Ostrofe the benefit of evidence clearly probative of the existence of a boycott.

A conspiracy between business entities to adhere to agreed-upon prices and sales territories can only be effective if the sales personnel of the participating companies adhere to

the prices and territories agreed upon in making sales on behalf of their employers. Therefore a trier of fact might reasonably infer from evidence of the existence of such a conspiracy that each of the participating companies had also impliedly agreed that it would secure the adherence of its sales personnel to the prices and territories agreed upon. It would also be reasonable to infer an understanding that any non-cooperating employee who jeopardized implementation of the conspiracy would be removed from his or her position and would not be rehired.

These inferences draw further support from the evidence that employees of Crocker's co-conspirators complained to Ostrofe about sales he made in violation of the conspiracy, that "highly placed" executives of the competing manufacturers complained to Crocker regarding Ostrofe's failure to adhere to the prices and territories agreed upon, and that Crocker then threatened to fire Ostrofe and bar him from future employment in the industry if he refused to cooperate.[29/]

Considering the evidence offered in opposition to the motion for summary judgment and the inferences that might be drawn from it in the light most favorable to Ostrofe,[30/] we conclude that the evidence was sufficient to create a factual issue as to whether Ostrofe had been discharged pursuant to an implied understanding among conspiring label manufacturers. The motion for summary judgment should have been denied without weighing the evidence to the contrary.[31/]

REVERSED.

FOOTNOTES

1/ See United States v. H.S. Crocker Co., 1978-1 Trade Cases ¶ 61,883 (N.D. Cal. 1976) and United States v. H.S. Crocker Co., 1975-2 Trade Cases ¶ 60,615 (N.D. Cal. 1975).

2/ See also Lessig v. Tidewater Oil Co., 327 F.2d 459, 466 (9th Cir. 1964); Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 13-14. (1st Cir. 1979).

3/ The district court erred in concluding the alleged "conspiracy was [not] directed . . . at plaintiff or other employees in any anti-competitive sense." The complaint alleged that the boycott element of the overall conspiracy was specifically directed at barring Ostrofe from employment. The purpose and necessary effect of the boycott was to eliminate competition in the marketing of Ostrofe's services in the industry. Thus, contrary to the district court's conclusion, the alleged conduct of defendant and its coconspirators "injured [plaintiff's] competitive position in the business in which he was engaged." GAF v. Circle Floor Co., 463 F.2d 752, 758 (2d Cir. 1972). (Emphasis in original.) Group boycotts directed at a single trader or employee are illegal per se regardless of the overall effect on the economy. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13 (1959).

4/ See also Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299 (4th Cir. 1979); Hoopes v. Union Oil Co., 374 F.2d 480, 485 (9th Cir. 1967); Steiner v. Twentieth Century-Fox Film Corp., 232 F.2d 190, 193 (9th Cir. 1956); United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 574 (2d Cir. 1916).

5/ Usually a unilateral refusal to deal has been involved. See Engine Specialties, supra, 605 F.2d 1; Lee-Moore Oil Co., supra, 599 F.2d at 1301-02. See also Albrecht v. Herald Co., 390 U.S. 145 (1968); Times-Picayune Publishing Co. v. U.S., 345 U.S. 594, 625-26 (1953). See generally 2 J. Von Kalinowski, Antitrust Laws and Trade Regulation, CH. 6C, pp. 6C-1 through 6C-31 (1981).

In Mulvey v. Samuel Goldwyn Productions, 433 F.2d 1073 (9th Cir. 1970) and Hoopes, supra, 374 F.2d 480, this court held plaintiffs injured by unilateral conduct in furtherance of an unlawful restraint not amounting to a refusal to deal had standing to sue.

6/ See Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972). See e.g., Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973) (the "direct injury" test); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 362 (9th Cir. 1955) (the "target area" test); Mulvey, supra, 433 F.2d at 1076 (the "reasonably forseeable" test); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151 (6th Cir. 1975) (the "zone of interest" test); Bravman v. Bassett Furn. Industries, Inc., 552 F.2d 90, 99-100 (3d Cir. 1977) (balance of factors test). See also California State Council v. Associated General Contractors, 648 F.2d 527, 537-38 & n.18 (9th Cir. 1980) (dictum approving zone of interests approach).

7/ See generally Berger & Bernstein, An Analytical Framework for Antitrust Standing, 86 Yale L. J. 809, 820-35 (1977); Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits - The Twenty-Third Annual Antitrust Review, 71 Colum. L. Rev. 1, 27 (1971).

Compare, for instance, Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971) with Congress Building Corp. v. Loew's Inc., 246 F.2d 587 (7th Cir. 1957) and Steiner, supra, 232 F.2d 190; compare Karseal, supra, 221 F.2d at 364-65 with Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970). See In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 n.6 (9th Cir. 1973).

Contrary to the dissent's contention, the rationale of this circuit's line of precedent applying the "target area" test has not been clear and consistent. See Berger & Bernstein, supra, 86 Yale L. J. at 834 n.112. Compare Mulvey, supra, 433 F.2d at 1076 with Contreras v. Grower Shipper Vegetable Association of Central California, 484 F.2d 1346, 1347 (9th Cir. 1973). Some cases have embraced the notion of foreseeability, see Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 220 (9th Cir. 1964), while others have seemingly ignored it. See In re Multi-district Vehicle Air Pollution MDL No. 31, supra, 481 F.2d at 129. Some have construed standing narrowly, Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951); others have broadly interpreted standing to encompass plaintiffs who were not engaged in the market which was the object of the unlawful activity. See Hoopes, supra, 374 F.2d at 485; Steiner, supra, 232 F.2d at 193; Karseal, supra, 221 F.2d at 364-65.

8/ The Third Circuit has taken a similar approach, resolving standing by balancing various factors on a case by case basis. See Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573, 581-87 (3d Cir. 1979); Bravman, supra, 552 F.2d at 99.

9/ See Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); see generally Pollock, Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine, 32 A.T.L.J. 5, 5-6 (1967); Berger, supra, 86 Yale L. J. at 809 n.1.

10/ "[T]he detection rate of antitrust violations is much lower than that of other crimes because an antitrust violation 'is usually a concealed crime and there is rarely an identifiable victim who is aware of the violation.'" Berger, supra, 86 Yale L J. at 847 n.172. (Citation omitted.)

11/ See N. 10, supra.

12/ The rights of private employees without contractual protection against arbitrary or retaliatory discharge are tenuous. See e.g., Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, (5th Cir. 1981) (former employee alleging he was discharged in retaliation for giving truthful deposition testimony in antitrust litigation has no cause of action for wrongful discharge under state law.); Martin v. Platt, 386 N.E.2d 1026 (Ind. App. 1979); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174, 178-79 (Pa. Supreme Court 1974); see generally 53 Am.Jur.2d, Master & Servant § 43 (1970); Annot. 62 A.L.R.3d 271 (1975);

Annot. 51 A.L.R.2d 742, 745-47 (1957). Cf. Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981); Harless v. First National Bank, 246 S.E.2d 270 (W.Va. 1978). See generally Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1816-24 (1980).

The dissent argues Ostrofe has a wrongful discharge cause of action under California law. But the California doctrine is a minority rule. Effective enforcement of federal antitrust laws cannot be made to depend upon the availability of alternate remedies under varying local laws.

The dissent's contention that allowing antitrust standing to an employee discharged for refusal to participate in an antitrust violation pretermits state employer-employee relations law "by heavy-handed interference from the federal courts" is specious. The overlap is minimal; our holding pertains only to employee terminations in furtherance of antitrust violations and not to the discharge of an employee for any other reason. As we demonstrate, infra, Ostrofe's termination lies within the core of Congressional concern underlying the antitrust laws.

13/ Cf. California State Council, supra, 648 F.2d at 538-39; Martens v. Barrett, 245 F.2d 844 (5th Cir. 1957). Also compare Engine Specialties, supra, 605 F.2d at 17-18.

The Ninth Circuit has denied standing to employees, Solinger, supra, 586 F.2d at 1311-1312, not because of a per se "no-employee-standing-rule" but because

employee injuries were found to be only incidental to an antitrust violation. See, e.g. Program Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1191-92 (9th Cir. 1980). The shortcomings of a standing rule based on categorization (i.e. by status as "employee," "distributor," "lessor" etc.) have been noted by Berger, supra at 830-32. The Fifth and Seventh Circuits have granted standing to employees able to show direct injury. See, e.g., Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967); Nichols, supra, 371 F.2d 332.

14/ See Areeda, supra, § 334 at p. 168; Lytle, supra, 25 Amer. Univ. L. Rev. at 801; Page, Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury, 47 U. Chi. L. Rev. 467, 500 (1980).

15/ See Hawaii v. Standard Oil, supra, 405 U.S. at 261-62; Calderone Enterprises, supra, 454 F.2d 1295.

16/ See Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975); Harrison v. Paramount Pictures, Inc., 115 F.Supp. 312, 317 (E.D. Pa. 1953), aff'd, 211 F.2d 405 (3d Cir. 1954).

17/ Cf. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); Loeb v. Eastman Kodak Co., 183 Fed. 704 (3d Cir. 1910).

18/ U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940); Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951); U.S. v. Topco Associates, Inc., 405 U.S. 596, 608 (1972).

19/ See Lytle and Perdue, Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation, 25 Amer. Univ. L. Rev. 795, 798-800 (1976); P. Areeda & D. Turner, 2 Antitrust Law § 333, p. 162 (1978).

20/ See Calderone Enterprises, supra, 454 F.2d at 1295; see generally Areeda, supra, § 333, p. 162, §§ 335a-335c, pp. 170-176, §§ 337d-337e, pp. 187-194. Where the underlying facts and magnitude of damages are reasonably clear, the danger of meritless vexatious litigation is minimal. See Sherman, Antitrust Standing: From Loeb to Malamud, 51 N.Y.U. L. Rev. 374, 402-03 (1976).

21/ See Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 486 (1977).

22/ Compare Solinger, supra, 586 F.2d at 1310; Engine Specialties, supra, 605 F.2d at 12-13; and Lee-Moore Oil, supra, 599 F.2d at 1302-03 with Bosse v. Crowell Collier & MacMillan, 565 F.2d 602, 606-07 (9th Cir. 1977).

23/ See John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498-500 (9th Cir. 1977); see also GAF, supra, 463 F.2d 759. Cf. Engine Specialties, supra, 605 F.2d at 12 n.16. See generally Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term - 1977, 77 Colum. L. Rev. 979, 994-997 (1977); Berger, supra, 86 Yale L. J. 835-40; 13 J. Von Kalinowski, Antitrust Lws and Trade Regulation, Ch. 101, pp. 101-3 (1980); Page, supra, 47 U. Chi. L. Rev. at 497-500.

24/ See, e.g., GAF Corporation v. Circle Floor Co., supra, 463 F.2d at 758; In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra, 481 F.2d at 127, Conference of Studio Unions, supra, 193 F.2d at 54.

Even under this construction, Brunswick would not bar recovery of treble damages for injuries sustained by Ostrofe from the alleged boycott, since such injuries would result directly from the elimination of competition in the marketing of Ostrofe's services. See N.3, supra.

25/ The same is true of In Re Multidistrict Vehicle Air Pollution MDL. No. 31 and Conference of Studio Unions.

Notwithstanding the language in these opinions, this court has held plaintiffs injured by conduct in furtherance of an unlawful restraint and not by its ultimate effect may have standing to sue. See Mulvey, supra, 433 F.2d 1073; Hoopes, supra, 374 F.2d 480; Steiner, supra, 232 F.2d 190.

GAF Corp. v. Circle Floor Co., supra, 463 F.2d 752 relied upon by the district court does not compel a contrary result. Plaintiff GAF manufactured floortile. Defendant Circle Floor Co. installed floortile and was a customer of GAF. Circle Floor attempted to acquire working control of GAF to gain a competitive advantage over other manufacturers and contract installers. As a part of the attempt to take over, defendant reduced its purchases from GAF thereby depressing the market price of GAF's stock. The court denied GAF standing to sue Circle Floor Co. under Section 4. The court held that the takeover would not have resulted in anticompetitive harm to GAF. Id. at 759.

GAF did not allege that its position in the market was or would be affected. Unlike the instant case and those cited supra at N.5, GAF was not driven out of business, terminated, or forced to comply at its own economic expense with the anticompetitive demands by the defendants.

With regard to the reduction of Circle Floor Co.'s purchases from GAF, the court held Circle Floor Co. had not alleged that the "refusal to deal" was either concerted or that it had diminished GAF's total sales or otherwise injured GAF. Id. at 759. The court did not suggest that an effective refusal to deal in furtherance of an anticompetitive goal would not have conferred standing had GAF in fact been injured thereby.

26/ This court has similarly stated standing under Section 4 is available "to those individuals whose protection is the fundamental purpose of the antitrust laws." In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, supra, 481 F.2d at 122. See California State Council, supra, 648 F.2d at 538 n. 18. See also Mid-West Paper Products, supra, 596 F.2d at 582-83.

27/ U.S. v. Wise, 370 U.S. 405 (1962).

28/ See Engine Specialties, supra, 605 F.2d at 13, 18; Lee-Moore Oil, supra, 599 F.2d at 1301, 1304.

29/ Crocker argues that evidence of a demand for employment, admittedly lacking here, was required to make out a cause of action for concerted refusal to deal, citing Cleary v.

National Distillers and Chemical Corp., 505 F.2d 695, 697 (9th Cir. 1974) and similar cases. Assuming this to be the law, summary judgment would still have been inappropriate. There was a disputed issue of fact as to whether a demand would have been futile. See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 377 F.2d 776, 781 (3d Cir. 1967), aff'd in part and rev'd in part, 392 U.S. 481 (1968).

30/ United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

31/ Scharf v. U.S. Attorney General, 597 F.2d 1240, 1243 (9th Cir. 1979); Robert Johnson Grain Co. v. Chemical Interchange Co., 541 F.2d 207, 210-11 (8th Cir. 1976).

Re: Ostrofe v. H.S. Crocker Co., No. 77-3985

KENNEDY, Circuit Judge, Dissenting:

Where policy arguments are bounced about in the freewheeling manner of the majority opinion, it is a sign that either no precedent exists to guide us, or that existing precedent is being ignored. In this case, it is the latter, but in any event the rule announced here is a departure from sound antitrust principles. I state my respectful dissent.

An appropriate starting point for the case is the Supreme Court's decision in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). I submit Brunswick stands for the proposition that antitrust laws are aimed at protecting competition, and that antitrust actions under section 4 of the Clayton Act are limited to persons injured as competitors in a defined market or in a discrete area of the economy. Brunswick does not mandate this

construction in so many words, but it is the fair and logical interpretation of the case; and I had thought, at least until today, this interpretation of Brunswick was established doctrine in this circuit. See Solinger v. A & M Records, Inc., 586 F.2d 1304, 1310, 1311 (citing Brunswick for propositions that "injury caused by the violation must be one the antitrust laws were designed to protect against"; and plaintiff must be within area of economy the antitrust laws were designed to protect); John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498-500 (9th Cir. 1977) (discussing and applying Brunswick analysis).[1/]

In In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.), cert. denied, 414 U.S. 1045 (1973) we emphatically re-embraced the target area theory for antitrust standing first set out in Conference of Studio Union v. Loew's Inc., 193 F.2d 51, 54-55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952), and we held that the

plaintiff must allege injury "in the area of the economy in which the elimination of competition occurred." 481 F.2d at 128. We have continually reaffirmed the rule in this circuit. See, e.g., Solinger v. A & M Records, Inc., 586 F.2d at 1310; Bosse v. Crowell, Collier & MacMillan, 565 F.2d 602, 606 (9th Cir. 1977); John Lenore & Co. v. Olympia Brewing Co., 550 F.2d at 499; Blankenship v. Hearst Co., 519 F.2d 418, 425-26 (9th Cir. 1975). Although dicta in a footnote in our recent opinion in California State Council of Carpenters v. Associated General Contractors of California, Inc., 648 F.2d 527 (9th Cir. 1980), cert. granted, 42 Supreme Court Bulletin (CCH) B-656 (January 11, 1982), indicated some discomfort with the doctrine, we again acknowledged that "[i]n this circuit, legal causation has traditionally been judged under the so-called 'target area' test."[2/] Id. at 537.

The target area test is not restricted to resolving only clear cases, as the majority

suggests, supra, majority opinion at 6, but rather was adopted carefully as a "logical and flexible tool" far superior to the crude direct injury test, which engaged in a "mere search for labels," and relied on "certain talismanic rubrics" to determine standing. In re Multi-district Vehicle Air Pollution M.D.L. No. 31, 481 F.2d at 127-28. The target area test embodies this circuit's balancing of competing policy interests to determine whether a particular claimant falls within the class of persons intended to be protected by the antitrust laws. The test implicitly enforces Brunswick's requirement that a plaintiff must allege injury "that flows from that which makes defendants' acts unlawful." 429 U.S. at 489.

This circuit's line of precedent is sound, yet the majority simply and erroneously ignores it. Here, the main conspiracy alleged as the premise of liability was not one to harm employees. It was one to fix prices and allocate customers in the nationwide market for paper

labels. Appellant was not in the area of the economy endangered by the breakdown of competitive conditions; that is, he was not injured by the labels industry breakdown "the antitrust laws were intended to prevent," Brunswick, 429 U.S. at 489. It may be true, under appellant's theory, that in a strict causation sense the employee's termination resulted from the conspiracy, but collateral damages to persons outside the competitive area aggrandized by antitrust defendants are inconsistent with the orderly administration of the antitrust laws. See Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The congressional concern underlying the substantive provisions of the antitrust laws was competition, not employee coercion or discharge. Appellant's intimate relation with the scheme is not sufficient; he must be intimately related to its anticompetitive effect.

The majority opinion argues also that appellant should have been permitted to challenge and establish the context of the conspiracy as a

whole in connection with an alleged boycott of his services and his employer's alleged unilateral refusal to deal with him in furtherance of the conspiracy. The cases cited for the proposition that persons have been permitted to challenge conspiracies as a whole even though their injuries resulted not from the principal object of the conspiracy but from a subsidiary boycott are authorities such as Radovich v. National Football League, 352 U.S. 445 (1957), and Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211 (1951). Those cases are quite inappropriate here, for they involved boycotts that were the same type as, and a part of, the larger conspiracy. In Radovich, for example, the plaintiff challenged an alleged boycott of his services by the N.F.L. in connection with the boycott of the league to which he belonged in furtherance of a monopoly of professional football, all of which the antitrust laws were designed to prevent. Here, Ostrofe's discharge was a matter of employee coercion apart from the

main price fixing scheme that the antitrust laws are designed to deter. See Conference of Studio Unions v. Loew's, 193 F.2d at 54. He cannot challenge the larger conspiracy in the guise of establishing the "context" for the alleged boycott against him.

Similarly, parties injured by unilateral conduct in furtherance of an unlawful restraint of trade have been permitted to challenge the overall scheme only when the unilateral conduct was part of, and created the same type of injury as, the main unlawful restraint conspiracy. See, e.g., Albrecht v. Herald, 390 U.S. 145 (1968) (plaintiff claimed his distributorship was cancelled by publisher because he refused to adhere to publisher's imposed maximum retail price); Engine Specialties, Inc. v. Bombardier Limited, 605 F.2d 1, 15 (1st Cir. 1979) (terminated plaintiff-distributor could challenge his manufacturer's agreement with another manufacturer to territorially divide market for minicycles because "ineluctable

result" of allocation and division of markets was termination, so antitrust injury under Brunswick existed); Lee-Moore Oil Co. v. Union Oil Co., 599 F.2d 1299, 1301-02 (4th Cir. 1979) (jobber terminated by supplier alleged conspiracy among major oil producers to drive out such maverick jobbers and restrain competition); Hoopes v. Union Oil Company of California, 374 F.2d 480 (9th Cir. 1967) (plaintiff service station owner claimed supplier sought to restrain competition by restricting retail outlets, including plaintiff's, to sale of supplier's gas). The plaintiff in the instant case was not in the target area of either the price fixing conspiracy or a unilateral discharge in direct furtherance of the elimination of competition, and his motion to amend was properly denied.

Finally, as for the alleged subsidiary boycott aimed at appellant himself, although generally an employee can challenge an alleged boycott of his services in the employment market of an industry, he must put forward evidence to

demonstrate the boycott apart from any other conspiracy. An unsupported inference of a boycott is not sufficient. Ostrofe's boycott claim was based solely upon alleged communications from his superiors to him, during his employment, that the company's competitors were complaining about Ostrofe's failure to cooperate. Appellant resigned voluntarily from the company despite their request for him to stay, and he did not attempt to obtain employment with any other industry employer. Appellant failed to offer any evidence whatsoever of ostracism or coercion alleged to have taken place since his resignation from the company. The district court properly granted summary judgment on the boycott claim for failure to come forward with evidence to support the charge. See Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 670 (9th Cir. 1980); Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977).

The majority unsupportedly extends the reach of the antitrust laws beyond established precedent and beyond the intent of Congress. I should suppose that on nearly every occasion when a federal court announces an expansion of federal law to a new and previously unregulated area of conduct, it can invoke deterrence as the rationale. The short answer to the argument here is that Congress did not design the antitrust laws to reach employee-employer relations as an enforcement mechanism. Congress has made participation in anticompetitive conduct a criminal offense, and this is a more direct and proper deterrent than to provide a treble damage windfall to discharged employees.

Even accepting for argument the theory that the necessity for deterrence is a ground for stretching antitrust actions beyond previously recognized boundaries, the deterrence argument is a weak one in this employee discharge case. The employee here already has considerable remedies and causes of action to deter conduct

of the sort alleged in the complaint. Since Petermann v. International Brotherhood of Teamsters, 174 Cal.App. 2d 184, 344 P.2d 25 (1959), California has recognized the right of an at-will employee discharged for refusal to perform an unlawful act to sue for wrongful discharge on a breach of contract theory. Most recently, in a case involving facts strikingly similar to those presented here, the California Supreme Court held that the employee also has a cause of action based upon the tort of wrongful discharge, subjecting the employer to compensatory damages, damages for emotional distress, and punitive damages. In Tameny v. Atlantic Richfield Company, 27 Cal.3d 167, 610 P.2d 1330, 164 Cal.Rptr. 839 (1980), the California Supreme Court allowed a wrongful discharge tort action to be brought by an employee against his employer where the allegation was that, while a retail sales representative, the employee was discharged for refusing to participate in an illegal scheme to fix the retail gasoline prices of defendant's franchisees.

Ostrofe therefore has alleged facts that, if true, are the basis for a weighty cause of action against his employer on state law grounds for punitive and compensatory tort and contract damages. Such actions will provide the substantial deterrence sought to be achieved by the majority through the device of the antitrust laws. Although the California doctrine has been adopted only in some jurisdictions, the number is increasing, see Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051, 1055 (5th Cir. 1981); Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1822-24 (1980) (discussing "public policy" exception and its growth), and the substantive rights of recovery for such conduct rightfully should occur in the employee discharge context, rather than under the antitrust laws aimed at product competition. This sensitive development in the law of employer-employee relations should not be pretermitted by heavy-handed interference

from the federal courts in the name of enforcing laws designed only for protecting the nation's competitive economic system.

I do not believe federalism is destined to fail, but neither is its continuance necessarily assured. If it does disappear, it will be primarily because those charged with enforcement of federal laws cannot resist the temptation to expand their jurisdiction to the outermost limits of abstract logic, even where history and common sense tell us the independent processes of our state systems are sufficiently vital to afford all the protection needed against certain evils. The decision of the court here illustrates that failing, and I dissent from the opinion and the judgment.

FOOTNOTES

1/ Dictum in California State Council of Carpenters v. Associated Gen. Contractors of Cal., Inc., 648 F.2d 527, 538 n.18 (9th Cir. 1980), cert. granted, 102 S.Ct. 998 (1982), referred approvingly to a "zone of interests" test adopted by the Sixth and Third Circuits. Even the Sixth Circuit, however, has modified its views expressed in Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975), which was cited in California State Council of Carpenters. In Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir. 1981), the court held that Brunswick "clearly establishes that a plaintiff must plead an injury of the type § 4 was intended to remedy before his case will be heard," id. at 1234, and the Court imposed the requirement that a plaintiff plead antitrust injury in addition to its zone of interests standing standard, id. at 1234-35.

It should be noted that, as modified in light of Brunswick, the Sixth Circuit's zone of interests test differs from this circuit's target area test only in that the former "does not inject an element of proximate cause into the standing inquiry," but rather reserves the issue of "directness" as one to be resolved upon a factual showing. 643 F.2d at 1235-36. Under this new "zone of interests" test of the Sixth Circuit, the plaintiff here would not have standing, because he has not alleged "antitrust injury," but rather improper employee discharge, a tort or contract type of injury.

It should be noted also that the Third Circuit did not adopt a "zone of interests" test, but rather a test applying a number

of factors, including direct injury and target area considerations, to each factual matrix. Cromar Co. v. Nuclear Materials & Equipment Corp., 543 F.2d 501, 506 (3d Cir. 1973). That circuit also has included Brunswick's antitrust injury requirement in the factors to be considered in determining standing. Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 582-83 (3d Cir. 1979).

2/ In an explicit acknowledgment that precedent points to a conclusion contrary to its own, the majority writes: "Brunswick could be read as limiting section 4 to suits for damages caused by the anticompetitive effect of the particular antitrust violation. Similar language appears in lower court opinions. 24/" Majority opinion at 1387. Study of the footnote signal reveals a string citation of three cases in which the second and third cases listed are opinions of our own court, squarely contrary to the theory of the majority here. In re Multi-district Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973); Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951). At an earlier point, the majority writes that "[t]he courts have devised various 'tests' for standing to sue," majority opinion at 1387. Again, in a string cite in footnote 6, is a case setting forth this circuit's target area test. I doubt the concept of the law of the circuit properly could be treated in such cavalier fashion even by an advocate, and for a majority on a panel of this court to do so is cause for surprise and dismay.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-74-0090 CFP

FRANK J. OSTROFE,

Plaintiff,

v.

H.S. CROCKER COMPANY, INC.,

Defendant.

ORDER GRANTING MOTION OF DEFENDANT FOR SUMMARY JUDGMENT

Filed October 14, 1977

ORDER

The Motion of Defendant H. S. Crocker Company, Inc. for Summary Judgment having come on regularly for hearing on Friday, October 7, 1977, in the Law and Motion Department of the above-entitled Court, James T. Fousekis of Steinhart, Goldberg, Feigenbaum & Ladar appearing for the defendant and moving party H. S. Crocker Company, Inc. and Darrell Salomon appearing for the plaintiff, and the Court having considered the Motion, Memoranda, Affidavits, deposition testimony and other documents submitted by the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there exists no genuine issue as to material fact and that defendant H. S. Crocker Company, Inc. is entitled to judgment as a matter of law and that therefore the Motion of

H. S. Crocker Company, Inc. for summary judgment be and hereby is granted.

DATED: October 14, 1977

/s/ Cecil F. Poole
CECIL F. POOLE
UNITED STATES DISTRICT JUDGE

B-3

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-74-0090 CFP

FRANK J. OSTROFE,

Plaintiff,

v.

H.S. CROCKER COMPANY, INC.,

Defendant.

JUDGMENT IN FAVOR OF DEFENDANT
H. S. CROCKER COMPANY, INC.

Cecil F. Poole, District Judge
Presiding.

Filed October 14, 1977

In accordance with this Court's Order granting summary judgment in favor of defendant H. S. Crocker Company, Inc., it appearing that there is no just reason for delay, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the within action be, and it is hereby, dismissed.

DATED: October 14, 1977

s/Cecil F. Poole
CECIL F. POOLE
UNITED STATES DISTRICT JUDGE

B-5

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-74-0090 CFP

FRANK J. OSTROFE,

Plaintiff,

v.

H.S. CROCKER COMPANY, INC.,

Defendant.

REPORTER'S TRANSCRIPT OF HEARING
ON MOTION FOR SUMMARY JUDGMENT

Cecil F. Poole, District Judge
Presiding.

Filed October 7, 1977

FRIDAY, OCTOBER 7, 1977 - MORNING SESSION

THE CLERK: Civil Case No. 74-90, Frank Ostrofe vs. H. S. Crocker Company.

Counsel, state your appearances.

MR. FOUSEKIS: Good morning, your Honor.

James T. Fousekis of Steinhart, Goldberg, Feigenbaum & Ladar for the defendant and moving party, H. S. Crocker Company.

MR. LAMONT: Charles Lamont for plaintiff, Frank Ostrofe.

THE COURT. Well, this is a motion for summary judgment.

MR. FOUSEKIS: That's correct, your Honor. May I proceed?

THE COURT: Yes.

MR. FOUSEKIS: Your Honor, this is a summary judgment case.

We believe there have been no facts at all, your Honor, to prove the one remaining issue in

this case, which is an alleged boycott of Plaintiff.

Plaintiff was an employee of H. S. Crocker, your Honor, and left employment.

THE COURT: I'm familiar with -- I have gone through it, I know what the facts are. An allegation that there was a conspiracy among the label manufacturers to jack up the prices and maintain them, and that the plaintiff was an employee of the Crocker Company at the time. And sometime in or about 1970 he left the employment of Crocker. And he says in his complaint that he had been the object of harassing actions and intimidation in an endeavor to keep him in line, and endeavors by the various corporate co-conspirators and their officers. So he left and went into the stock-brokerage business in 1970.

And in 1974, he filed this action claiming that he had been excluded from - it's a private antitrust action, isn't it?

MR. FOUSEKIS: Yes, your Honor.

THE COURT: He had been excluded from re-entering that business, because of the attitudes and actions of those persons whom he named as co-conspirators.

You have now moved for summary judgment, and you set forth the facts in your -- by affidavits and depositions.

MR. FOUSEKIS: That's correct, your Honor.

THE COURT: That while he is claiming that he was excluded from the market, from the field, by his own responses, and by the responses of the other persons, it's clear that he has made -- he never made any effort to come back into the field.

MR. FOUSEKIS: Exactly correct, your Honor.

THE COURT: The record is also bare of any showing of any independent positions taken during the seven years by the defendant which would have the effect of intimidating him in any efforts to return.

MR. FOUSEKIS: That's correct, your Honor.

THE COURT: Have I missed something on this?

MR. FOUSEKIS: No, your Honor, that's exactly the only issue is the boycott.

THE COURT: If that's your position, I would like to hear what the plaintiff says about it.

MR. LAMONT: Well, I think your Honor places our case almost correctly, but I think I would add that the issue in this case is not so much the fact that he was excluded from the market afterwards, but also the fact that he was pushed out of the market to begin with.

And I think that what Defendants are trying to orient the case in the direction of is that this man should have gone around to all the label manufacturers after he left the employ of H. S. Crocker and applied for jobs.

But the point is that the conspiracy was in effect prior to 1970, prior to the date he left, and that he was forced out at that time.

Okay. At that particular instant, he was damaged. At that particular instant, he no longer had employment in the labeling industry, he no longer had employment with H. S. Crocker, which is the defendant in this case and was the company with which he wished to be employed.

So, now, we are in a position where defendant comes back in and says that he should have gone out and sought re-employment. I don't see why that has to occur at all in order to have a good claim for boycott.

THE COURT: Your plaintiff didn't have any standing, you know, so far as conspiracy --

MR. LAMONT: No, sir, the price-fixing conspiracy, yes, that's correct.

THE COURT: So what you are alleging here is narrower.

You said there was a conspiracy among the label manufacturers to police and protect -- and that Crocker conspired with its competitors to boycott persons who would not go along with

the primary conspiracy to fix the price of the labels.

MR. LAMONT: That's correct, your Honor.

THE COURT: That's your position, isn't it?

MR. LAMONT: What I am saying, that boycott was in effect while Mr. Ostrofe was employed with H. S. Crocker. In other words, at the time there was a price-fixing conspiracy, there was also a conspiracy --

THE COURT: He doesn't have any standing about somebody else. He can talk about himself.

MR. LAMONT: That's correct.

THE COURT: Now, he is saying this is a boycott, and they ostracized people that didn't go along.

MR. LAMONT: That's correct.

THE COURT: They didn't fire him.

MR. LAMONT: They forced him out.

THE COURT: How?

MR. LAMONT: I have in his affidavit they told him, quote, unquote, they would drop him like a dirty shirt, his bonus would be tied to his ability to cooperate in the price-fixing conspiracy.

THE COURT: Didn't they ask him to stay?

MR. LAMONT: They asked him to stay, because if he left, your Honor, they knew he'd blow the whistle on them.

THE COURT: Did they not ask him to stay? Isn't that what he said, they asked him to stay?

MR. LAMONT: They asked him to stay. It's also interesting to note, it says in his affidavit he resigned in 1969, and they asked him to stay at that time. When they asked him to stay in 1969, they told him he wouldn't have to commit any more conspiratorial acts.

THE COURT: He left and went to Dean Witter, or somebody, he went in the stockbrokerage business.

MR. LAMONT: That's correct.

THE COURT: Can you point to any evidence of intimidation or ostracism or coercion that is alleged to have taken place since the time he voluntarily resigned?

MR. LAMONT: I suppose that we can't. The point of the whole case, your Honor, is that he was already forced out at that particular instant. Now, we come in with a motion. They say he has to go around and ask all these former conspirators for employment, and we have to produce evidence.

THE COURT: We don't know. He never tried. He didn't come back to Crocker, that's for sure. The record -- this is the record I have before me -- the record that they asked him to stay, that he declined, that at the time he left he already had accepted employment with Dean Witter. That's true, isn't it?

MR. LAMONT: Well, yes.

THE COURT: He has not, since that time, made any request to come back in the field, nor is there any evidence in the record that anybody said, "You can't get back in."

MR. LAMONT: That's correct.

THE COURT: That's all I have before me.

MR. LAMONT: What I'm also trying to point your Honor to, the record that says at the time he left there was an active conspiracy to knock people out of the industry who weren't going to cooperate with the conspiracy. Obviously, they would ask him to stay, they knew if he went, he would go right to the Department of Justice, and that's exactly what he did.

THE COURT: He did, anyhow, didn't he?

MR. LAMONT: He went to the Department of Justice.

THE COURT: They didn't stop him from going to the Department of Justice.

MR. LAMONT: After he left.

THE COURT: I must say it's too attenuated for me. It's in a realm of legal hypothesis that has escaped me completely.

I am going to grant the motion for summary judgment.

MR. LAMONT: There is no way I can say to your Honor that I think that there is probably at least enough of an issue to go to trial on the fact that he has testified --

THE COURT: That's what I don't see. I don't see a single material issue to be tried. That's the only reason I say I'm going to grant it. You may be right, they may have harbored all of those malevolent intentions. I'm not saying that those people weren't exactly how you characterize them. That's not what I'm saying. I don't know.

What I'm simply saying is, if it is so, they were remarkably disciplined in what they did not do; that is, they did not do the acts of

ostracism that is a predicate of your claim here.

Now, there maybe -- maybe, they were too smart, you know. I'm sorry if that's the case, as far as the plaintiff is concerned, but I can only proceed on what I have before me. I don't know what is in their minds.

MR. LAMONT: What I'm trying to say, your Honor, I think there is an issue of fact, because he has produced the testimony from these depositions that these guys would have hired him. On the other hand, we're saying there is evidence in the record -- if not, there is judicial notice that can be taken that these guys were involved in a conspiracy to fix prices. I think on the one hand you have gentlemen who were working for companies who, indicted, testifying that they would have hired him. I find that to be a credibility issue.

THE COURT: They don't become incompetent witnesses. I would say if a jury sat in a jury

box -- and this is with the state of the evidence -- and they returned a verdict in the plaintiff's favor based on that evidence, I would, just as soon as the time arrived, set it aside beyond any question.

MR. FOUSEKIS: That's right, your Honor. There's absolutely no evidence in this record whatsoever of a boycott. He has got to come forward.

THE COURT: I don't find any. And I would expect in response to this motion that the plaintiff would put its best foot forward as to whatever it had. I think you have been candid about what you have. That's how I resolved it.

So I will grant your motion.

MR. FOUSEKIS: Your Honor, we submitted an order with the motion.

THE COURT: It's probably in here someplace. You submitted a whole lot of things, two and a half inches worth of things in here. We will find it, we will get it signed.

MR. FOUSEKIS: Thank you very much, your Honor.

THE COURT: All right.

MR. FOUSEKIS: We can send another copy out, if you like, your Honor.

THE COURT: I think we have it. If Mr. Casabonne can't find it, we will let you know.

MR. FOUSEKIS: Thank you.

(WHEREUPON, the proceedings were concluded.)

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case No. C-74-0090 WTS

FRANK J. OSTROFE,

Plaintiff,

v.

H.S. CROCKER COMPANY, INC.,

Defendant.

MEMORANDUM OF DECISION

William T. Sweigert, District Judge
Presiding.

Filed December 2, 1975

This is an antitrust action invoking jurisdiction under Section 4 of the Clayton Act (15 U.S.C. § 15), and Sections 16720 and 16750 of the California Business and Professions Code, brought by plaintiff, a former national sales manager for defendant H. S. Crocker Company, a California corporation engaged in the manufacturing, processing and marketing of labels, alleging that defendant and certain unidentified co-conspirators engaged in a combination and conspiracy to restrain trade in the labels industry in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1,2) and Sections 16720 and 16750 of the California Business and Professions Code. Plaintiff seeks treble damages, costs, and attorneys' fees.

The case is now before the court on plaintiff's motion to amend the complaint (Doc. No. 37) and defendant's motion for summary judgment (Doc. No. 36).

The record before the court on the pending motions consists of the complaint, and

plaintiff's proposed amendment to the complaint, along with evidentiary matter outside the pleadings as follows:

Plaintiff's affidavit of Aug. 26, 1975, attached as Exhibit B to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (Doc. No. 38); Plaintiff's Answers to First Interrogatories of Defendant, Answers No. 1 and 4 (Doc. No. 31); and defendant's Affidavit of Michael A. Kahn, attached to Defendant's Reply Memorandum in Support of Motion for Summary Judgment (Doc. No. 44).

The complaint alleges an anti-trust conspiracy in restraint of interstate commerce, in that it is alleged therein that labels manufactured by defendant and co-conspirators are sold in interstate commerce and that the defendant and co-conspirators have conspired to fix prices, rig bids, and allocate customers for the purpose of eliminating competition in the interstate label trade.

The complaint alleges, in substance and effect, that defendant and the co-conspirators conspired to boycott those persons, including plaintiff, who have interfered with their illegal trade practices; that when plaintiff first became defendant's national sales manager for paper labels in 1964, he was coerced by officers of defendant into participating in such bid rigging and price fixing; that eventually, when plaintiff on numerous occasions refused to continue to participate, certain co-conspirators of the defendant complained to defendant's officers about plaintiff's refusal; that as a result of these complaints plaintiff was repeatedly warned by defendant that he would lose his job if he did not continue to participate and that he would not receive previously promised financial compensation and that he would be prevented from ever being employed in the labels marketing industry in the future; that as a result of these threats and plaintiff's foreclosure from any hope of advancement, he was

forced to resign his position with defendant on July 6, 1970 and has been boycotted ever since from the labels industry.

I. Plaintiff's Motion to Amend the Complaint:

Plaintiff made his motion to amend the complaint on August 29, 1975, after defendant filed its motion for summary judgment on June 25, 1975. It is appropriate, however, to consider the motion to amend under Rule 15(a) before deciding whether or not to grant summary judgment. As stated in 6 Moore's Federal Practice ¶ 56.10, "since a summary judgment is an adjudication on the merits and because of Rule 15, it is the duty of the trial court freely to allow amendments to the pleadings, unless the application to amend smacks of dilatory tactics or in some other respect fails to further justice." An amendment will not necessarily defeat the motion for summary judgment unless the amendment is substantial and not merely a change of form.

In a Memorandum of Decision filed Dec. 4, 1974, denying in part defendant's motion to dismiss the complaint, this court held that, although plaintiff did have standing to complain of a conspiracy to boycott employees, plaintiff did not have standing to complain of the alleged conspiracy to fix prices because

> that conspiracy was directed, not at plaintiff or other employees in any anti-competitive sense or even at his employer, but only at competitors of the conspirators in the lithograph market. (P. 4:4-7).

Plaintiff now seeks to add a cause of action for defendant's unilateral action in refusing to deal with plaintiff by not employing him, which refusal plaintiff alleges was a unilateral action in furtherance of a conspiracy to fix prices and engage in other anti-competitive conduct in the labels industry. The proposed amendment is as follows:

> The aforesaid combination and conspiracy to fix and maintain prices, submit rigged and collusive bids,

> and allocate customers, markets and/or territories has been effectuated in part by defendant by terminating plaintiff as national sales manager for paper labels when plaintiff failed to cooperate in the aforesaid conspiracy. (Paragraph 9, First Amended Complaint, attached as Exhibit A to Plaintiff's Motion to Amend the Complaint).

Plaintiff contends that a unilateral action, which in the absence of a conspiracy would be lawful, when done in furtherance of a conspiracy to restrain trade, is a violation of the anti-trust laws, citing Albrecht v. Herald Co., 390 U.S. 145 (1968); that this amendment in no way changes the theory of plaintiff's case, and that the basic issue is whether plaintiff was unlawfully forced to resign as an employee of defendant, either pursuant to an unlawful conspiracy or a unilateral act performed to effectuate such a conspiracy; that, although plaintiff has no standing to complain of a price-fixing conspiracy, pursuant to this court's Dec. 4, 1974 Memorandum of Decision, plaintiff

does have standing to complain of a unilateral act in furtherance of such a conspiracy, citing Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y. 1969) and McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743 (E.D.Pa. 1964); that plaintiff is merely alleging the existence of a price-fixing conspiracy as the factor which makes the unilateral refusal to deal unlawful.

Although defendant agrees that a unilateral refusal to deal not performed in furtherance of an unlawful conspiracy does not violate Section 1 of the Sherman Act, citing Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), defendant contends that, since plaintiff does not have standing to complain of a price-fixing conspiracy, and since the unilateral refusal to deal is alleged to have been connected only to such a price-fixing conspiracy, plaintiff's proposed amendment should be denied, also citing Interphoto, supra, and McKesson, supra.

Plaintiff has cited no authorities, nor have we discovered any, in which a plaintiff, who lacked standing to challenge an allegedly anticompetitive practice, was nevertheless allowed to complain of a unilateral refusal to deal done in furtherance of the alleged illegal activity. In the Interphoto and McKesson cases, plaintiffs were themselves the objects of the illegal conspiracies and the unilateral actions done to further the conspiracies. Plaintiff herein, however, was not the object of the price-fixing conspiracy. To allow the proposed amendment would, in effect, be to allow plaintiff to complain of the alleged price-fixing conspiracy, since plaintiff would be required to show at trial the existence of such a conspiracy in order to prove that the unilateral action was unlawful. Indeed, the language of the proposed amendment illustrates the inseparability of the allegation of conspiracy from the unilateral action claim. If we were to allow the amendment, we would be granting plaintiff standing to

complain of the price-fixing conspiracy, which was previously denied.

In the prior Memorandum of Decision, this court determined that plaintiff has standing to complain of the alleged conspiracy to boycott the plaintiff as an employee. An amendment alleging a unilateral refusal to deal by not employing plaintiff done in furtherance of a conspiracy to boycott would be considered by this court.

For the foregoing reasons, the plaintiff's motion to amend the complaint should be and hereby is, denied.

II. Defendant's Motion for Summary Judgment:

The evidentiary record above-described shows in substance and without dispute that plaintiff resigned from employment with defendant and, thereafter, never asked his former employer to rehire him, nor applied for employment with other companies in the label industry. (Plaintiff's Answer to First Interrogatories of Defendant, Nos. 1 and 4).

The evidentiary record does, however, show a dispute between the parties on the factual basis for plaintiff's failure to request or demand specific further employment in the label industry. In his evidentiary showing by his affidavit, plaintiff alleges:

> After seven years' experience in the label printing business, my only potential for an executive position commensurate to my former sales and management position with H. S. Crocker was with one the nationwide firms. All such firms were engaged in the conspiracy and had complained bitterly to H. S. Crocker over a period of years about my lack of cooperation in the illegal plan. Obviously, it would have been futile to seek employment with such firms, in my estimation. Furthermore, any such position with a major competitor of H. S. Crocker would necessarily require my participation in or approval of collusive price-fixing activities in the label industry.
>
> Because of my refusal to cooperate with the price-fixing activities in the label industry, I was compelled to seek employment

> in an entirely new industry. I took a stockbroker trainee position with Dean Witter & Co. I chose the securities industry because of previous experience in handling commodity trading as part of my job responsibility with a former employer, Safeway.

Defendant's counter showing on this subject is set forth in the affidavit of Michael Kahn, which affidavit incorporates by reference notarized applications by plaintiff for employment as a stock broker wherein plaintiff stated his reason for leaving the employ of the defendant as "opportunity", and "greater opportunity". (Exhibit A, Exhibit B2, incorporated by reference in Affidavit of Michael A. Kahn.)

In support of the motion, defendant contends that a demand by plaintiff that defendant deal with him - here, a demand for employment- is an essential element of the proof of conspiracy to boycott, and that, inasmuch as plaintiff has admitted failure to demand employment, there is no issue of material fact and summary judgment should be granted. Defendant

principally relies on two Ninth Circuit cases, Cleary v. National Distillers and Chemical Corp., 505 F.2d 695 (9th Cir. 1974), and Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971).

Defendant further contends that, even if demand is excused on the grounds of futility or lack of necessity to demand, demand should not be excused in the instant action, where plaintiff voluntarily chose not to seek re-employment from the defendant.

Opposing the motion, plaintiff contends that there is no categorical rule that a demand to deal is always required in conspiracy to boycott cases and that demand is excused where it would be futile, relying on Royster Drive-In Theatres v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246 (2d Cir. 1959); Congress Building Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957); and Saunders v. National Basketball Assoc., 348 F. Supp. 649 (N.D. Ill. 1972); that demand by the plaintiff for re-employment would have been futile because

plaintiff argues that he was known in the labels industry as uncooperative in the alleged conspiracy.

The question before this court on the motion for summary judgment is whether a demand by an employee for employment from an employer who allegedly engaged in a concerted refusal to employ him is a prerequisite to the maintenance of the employee's action. If this is found to be the rule, the court is constrained to grant summary judgment because there is no dispute that plaintiff herein did not apply for employment with defendant or any of the other alleged co-conspirators.

In Cleary v. National Distillers and Chemical Corp., 505 F.2d 695 (9th Cir. 1974), an individual plaintiff alleged the existence of a conspiracy to prevent him from purchasing a hydro-carbon detection device. At trial, plaintiff proved that he had contacted defendant and expressed a "desire and need" for the device, and that he was given the "run around". The

Ninth Circuit affirmed the district court's finding that this was evidence of mere preliminary negotiations, and that there was no evidence of a firm demand to purchase, holding,

> A demand and refusal is a prerequisite to a claim of concerted refusal to deal. Royster Drive-In Theatres v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246 (2d Cir. 1959). A plaintiff can have no relief when his failure to obtain a desired product is attributable to his own failure to make a request. (Citation omitted) (Id. at 697).

In Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971), the Ninth Circuit upheld summary judgment on the ground that the record lacked any evidence of conspiracy to monopolize, noting that the record showed that one of the reasons for plaintiff's failure to obtain films was his failure to bid for (i.e. "demand") them.

Although the Cleary court's per curiam opinion did not discuss whether the requirement of demand is without exception, the court did,

however, cite and rely on Royster Drive-In Theatres v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246 (2d Cir. 1959), cert. denied, 361 U.S. 885 (1959). In Royster, plaintiff movie theatre owner alleged under §§ 1 and 2 of the Sherman Act that defendants, a movie distributor and a theatre owner, had conspired to monopolize the movie exhibition business by withholding from plaintiff and awarding to his competitor the more desirable movies. The trial court dismissed the action at the close of plaintiff's case because no demand had been proved. Plaintiff argued on appeal that its failure to make a demand should not be fatal because (1) demands would not have had any effect and (2) the policy of defendants was to give plaintiff good movies only if they could not be exhibited at the defendant's theatre. Although the court found no evidence in the record for the purported excuses in the case before it, the court did observe that, "perhaps on occasion circumstances may excuse the lack of demand" (citation omitted) (Id. at 251).

Decisions of district courts have also discussed the issue of whether or not demand is an essential element in a plaintiff's refusal to deal case. In United States v. Loew's, Inc., 189 F.Supp. 373 (S.D.N.Y. 1960), vacated on other grounds, 371 U.S. 38 (1962), the government brought a civil antitrust action against motion picture distributors predicated on the "block" booking practice, which required television stations to buy "packages" of desirable and less-desirable films. The defendants urged that there could be no conclusion of a refusal to sell films except on the "package" basis unless a station made a clear demand for films on a different basis. The district court in Loew's concluded that a demand was not a pre-requisite to a finding of refusal to deal for two reasons: (1) this was an action in which the government was seeking an injunction, and (2) since the Royster decision said demand may sometimes be excused, the district court did not believe that a specific demand was a necessary prerequisite

if there is other evidence sufficient to justify a finding that there was a refusal to deal.

In Saunders v. National Basketball Assoc., 348 F. Supp. 649 (N.D. Ill. 1972), the court granted summary judgment for defendants on statute of limitations grounds, but observed in dictum that the plaintiff basketball player, in charging a conspiracy by NBA teams to boycott him out of the game, had never alleged that he requested a try-out. The court further noted that since plaintiff's college basketball performance was not so excellent that an offer by the NBA would have been a foregone conclusion, there is no evidence that a request for employment would have been unnecessary.

The Supreme Court, in the context of an action involving a conspiracy to monopolize rather than to boycott, discussed the question of what measures the plaintiff must take to avoid a finding that competitive injury from a lack of supply resulted from his own failure to seek supplies from sources other than the

defendant (Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690 (1962)). In Continental, the Supreme Court reversed the decision of the Ninth Circuit that before a supplier could be held liable for damages to the buyer for a shortage of a product, the plaintiff buyer must show both that it made timely demands for the product and that it exhausted all other possible sources. The Supreme Court explicitly repudiated the Ninth Circuit's formula:

> Under the criteria used by the Court of Appeals, respondents could, with impunity, concertedly refuse to deal with Continental while the latter was able to obtain some oxide from independent sources, and finally insist that Continental make repeated demands for respondents' oxide before incurring antitrust liability. The cases relied upon by the Court of Appeals clearly do not support any such formula and we cannot deem the injury alleged to flow from a monopolist's elimination of one's independent suppliers to be so "remote" as to justify refusing to let the damages issue go to the jury. (Id. at 699, 700).

Conclusion:

It is undisputed in the record that plaintiff did not seek re-employment with defendant. In certain situations, an explicit demand by plaintiff that defendant deal with him may be futile or unnecessary. Indeed, the authorities cited above recognize that demand may be excused where it would have been unnecessary or where there was other evidence sufficient to justify a finding of a concerted refusal to deal. From our review of these authorities, we are not convinced that any of the decisions on the question have established an absolute rule that an explicit demand is always a prerequisite to the maintenance of a concerted refusal to deal action. The cases which have required an explicit demand are distinguishable from the present case in that they all involved a distributor's failure to make a demand from a supplier, a factual situation clearly different from the facts here, where the plaintiff, who may be deemed to have been constructively terminated by the defendant, failed to seek re-employment.

We therefore conclude that, in the instant case, plaintiff's failure to demand re-employment of defendant does not, as a matter of law, preclude him from maintaining a cause of action for conspiracy to boycott him as an employee. As to whether or not it would have been futile for plaintiff to demand re-employment, we find that this factual question remains in dispute.

Upon the law as above set forth, we decline to hold that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Accordingly, it is ordered that defendant's motion for summary judgment should be and hereby is denied.

Dated: December 1, 1975.

s/ William T. Sweigert

WILLIAM T. SWEIGERT
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

No. 74 0090 WTS

FRANK J. OSTROFE, Plaintiff,

vs.

H. S. CROCKER COMPANY, INC., Defendant.

MEMORANDUM OF DECISION

Filed December 4, 1974

This is an action brought under Section 4 of the Clayton Act, 15 U.S.C. 15, by plaintiff, a former national sales manager for H. S. Crocker Company, a California corporation engaged in the manufacture of lithograph labels, alleging an anti-trust combination between defendant and other conspirators in the lithograph label business and seeking treble damages.

The case is before the court on defendant's motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted. Alternatively, defendant seeks an order requiring plaintiff to make a more definite statement of certain allegations. The record consists of the complaint alone.

The complaint sufficiently alleges an anti-trust conspiracy in restraint of interstate commerce in that the lithograph labels manufactured by defendant and co-conspirators are sold in interstate commerce; that the defendant and co-conspirators, other manufacturers of litho-

graph labels, have conspired to fix prices, rig bids, and allocate customers for the purpose of eliminating competition in the interstate trade of lithograph labels.

The complaint then goes on to allege that defendant and co-conspirators conspired to boycott those persons, including plaintiff, who have interfered with their illegal trade practices; that, when plaintiff first became defendant's national sales manager in 1964, he was coerced by officers of defendant into participating in such bid rigging and price fixing; that eventually, when plaintiff on numerous occasions refused to continue to participate, certain co-conspirators of the defendant complained to defendant about plaintiff's refusal; that as a result of these complaints plaintiff was repeatedly warned by defendant that he would lose his job if he did not continue to participate and that he would not receive previously promised financial compensation and that he would be prevented from ever being employed in the labels industry marketing

in the future; that as a result of these threats and plaintiff's foreclosure from any hope of advancement, he resigned on July 6, 1970 and has been ever since boycotted from the labels industry.

In support of its motion to dismiss defendant contends that these allegations are insufficient to support the federal anti-trust law jurisdiction of this court, arguing that, although plaintiff alleges a conspiracy to restrain interstate commerce, his connection with that conspiracy is insufficient to support anti-trust jurisdiction.

The question, however, is not whether this court has jurisdicton of the subject matter - it clearly does. The question is whether plaintiff has standing - as a "person injured in his business or property by reason of anything forbidden in the anti-trust laws" within the meaning of the Clayton Act Section 4, 15 U.S.C. § 15. (Compare Clayton Act Section 16, 15 U.S.C. § 26).

In In re Multidistrict Vehicle Air Pollution MDL No. 31, 481 F.2d 122 (9th Cir. 1972), this Circuit considered at length the test for determining standing under this statute, holding that (1) a plaintiff must "allege injury to his 'business or property,' a term definitively limited to interests in commercial ventures or enterprises," citing Hawaii v. Standard Oil Co., 405 U.S. 251 (1972), and (2) such injury must have been "by reason of" the alleged anti-trust violation in the sense that "anti-competitive conduct directed against an area of the economy injured business operations conducted by the claimant in that sector of the economy."

Applying that test, the court held that farmers, claiming reduction of crop yields as a result of an alleged conspiracy of automobile manufacturers to eliminate competition in pollution equipment were not within the "target area" of a conspiracy directed toward an area in which no commercial interest of the farmers fell

and that, therefore, the farmers had no standing under 15 U.S.C. 15. See also Contreras v. Grower Shipper Vegetable Assn., 484 F.2d 1346 (1973).

In GAF v. Circle Floor Co. Inc., 463 F.2d 752 (2d Cir. 1972), a case in which plaintiff, a manufacturer of floor tile, alleged that defendants were conspiring to gain control over plaintiff for the purpose of lessening competition in the floor tile installation market (i.e., by eliminating plaintiff manufacturer as a source of supply to floor tile distributors in the installation market) the court, applying the above test, held that plaintiff lacked standing because the anti-competitive combination was aimed at and would affect, not plaintiff floor tile manufacturer, but only competitors of defendants in the floor tile installation market, saying (p. 758): "Not all persons who may be able to trace an economic loss to a violation of the antitrust laws can recover under those laws. The Supreme Court has stated that, in determining who may sue under Section 4, the central question

is one of competitive injury," citing Apex v. Leader, 310 U.S. 469, 492-93 (1940) and Perkins v. Standard Oil, 395 U.S. 642 (1969) * * * * "This court has emphasized that to recover the plaintiff must allege and prove that the illegal restraint of trade injured his competitive position in the business in which he is or was engaged. Consequently, a plaintiff must allege a causative link to his injury which is 'direct' rather than incidental or which indicates that his business or property was in the 'target area' of the defendant's illegal act."

In the pending case the gist of the complaint is that plaintiff was an employee of defendant H. S. Crocker Company, rather than a person engaged in any commercial enterprise or venture; further, that the conspiracy was directed, not at plaintiff or other employees in any anti-competitive sense or even at his employer, but only at competitors of the conspirators in the lithograph label market. Any effect upon plaintiff was, not an effect of the alleged

anti-competitive conduct but at most an alleged incidental effect upon an employee who eventually refused to continue participation in the conspiracy.

It has been held that loss of a corporate position or office, and the salary incident thereto, and even a loss of plaintiff's general credit or reputation, are not injuries to business or property within the meaning of the statute. Corey v. Boston Ice Co., 207 F. 465 (D.C.Mass. 1913); Gerli V. Silk Assn., 36 F.2d 959 (D.C.N.Y. 1929); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (9th Cir. 1951), cert. den. 342 U.S. 919 (1952); Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), cert. den. 401 U.S. 923 (1970); Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir, 1973); Mans v. Sunray DX Oil Co., 352 F.Supp. 1095 (N.D. Oak. 1971).

We are mindful of cases which, taking a more liberal view of the Clayton Act, Section 4, hold that an employee's loss of his employment, if that is a reasonably foreseeable result of a defendant's anti-trust combination or monopoly,

has standing to sue the violator under Clayton Act, Section 4 (15 U.S.C. 15).[1/]

However, in all of those cases the employee's loss of employment or reduction of his salary resulted from the adverse effect of the alleged anti-competitive conduct upon the employer's business, causing in turn the employee's salary loss. This distinction has been noted in Harris v. Shell Oil Co., 371 F.Supp. 376, 379 (D.C.Ala. 1974).

In the pending case the facts alleged show that plaintiff's claimed coerced resignation did not result from the anti-competitive agreement of the conspirators, including plaintiff's employers for price fixing, bid-rigging and allocation of customers. Those anti-competitive practices were aimed at and adversely affected, neither the conspirators nor their employees, but only third-party business competitors of the conspirators in the lithograph label market. Indeed, the facts alleged indicate that the business of plaintiff's employer (and consequently

the economic base of plaintiff's job) far from being adversely affected by the alleged antitrust practices, was presumably a beneficiary of them - albeit a law-breaking beneficiary.

We have in mind, however, that the complaint in our pending case alleges that, in addition to the price fixing, etc., agreement of the conspirators, they had an understanding to boycott those persons, including plaintiff, who interfered with their anti-competitive practices.

We must consider, therefore, a possible theory upon which plaintiff employee could claim standing under Section 4, i.e., that the alleged understanding between defendant and other lithograph firms to boycott employees who interfered with the primary conspiracy, constitutes, itself, a separate antitrust conspiracy so aimed at and affecting employees that employees should have standing to sue under Section 4.

In Radovich v. National Football League, 352 U.S. 445 (1957), plaintiff, a professional football player and coach, suing for treble

damages and injuctive relief under Section 4 of the Clayton Act, alleged the existence of a conspiracy by the defendant League members, part of which was to blacklist plaintiff and to thus prevent his employment in organized football. The Supreme Court, holding that professional football activities were subject to federal antitrust laws and remanding the case for trial, noted that the League's activities as alleged, including the alleged boycott of plaintiff, were within the coverage of the antitrust laws and that the complaint stated a cause of action thereunder. Radovich, supra, at 448; see also Nichols v. Spencer, n. 1, supra.

Mans. v. Sunray DX Oil Company, 352 F.Supp. 1095 (D.C.Oak. 1971), which denied Section 4 standing to an employee who was terminated by his employer when he refused transfer after an allegedly illegal merger, exemplifies this distinction, saying, "Plaintiff's case is not like those involving blacklisting

[citing Radovich, supra, and Nichols, supra] . . . . There is no suggestion whatever that plaintiff [in the Mans case] has been blacklisted by anyone including the defendants nor that there is any agreement between the defendants or anyone else to not employ each others' employees for a period of time . . . . Plaintiff claims only to be a salaried employee." Supra at 1098.

Similarly, in Reibert v. Atlantic Richfield Co., supra, which also denied standing to a plaintiff, employee of defendant seeking damages under Section 4 for loss of his employment as a result of an allegedly illegal merger, exemplifies the distinction, saying, " . . . these cases [referring to Nichols, supra., Radovich, supra, and Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), aff'd. 407 U.S. 258 (1972) are inapposite . . . [in that] each case alleges antitrust violations directed against the blackballed party." 471 F.2d 727, 730-731.

In our pending case, it is expressly alleged that defendants conspired to boycott persons, including plaintiff who would not go along with the primary conspiracy.

Upon the law as above set forth, we decline to hold upon a motion directed to the pleading alone, that plaintiff fails to state a claim upon which relief can be granted.

Accordingly, it is ordered that defendant's motion to dismiss should be and hereby is denied, without prejudice, however, to a properly documented motion for summary judgment presenting the issue.

Dated: December 4, 1974.

/s/ William T. Sweigert

WILLIAM T. SWEIGERT
United States District Judge

1/ In Data Digests v. Standard-Poor, 43 F.R.D. 386 (S.D.N.Y. 1967) plaintiff corporation, alleging injury as a result of defendant's antitrust violations, was allowed to amend its complaint to add its president as a party-plaintiff alleging reduction of his salary as a result of defendant's violations.

In Daily v. Quality School Plan, 380 F.2d 484 (5th Cir. 1967) a former supervisory employee of one of the defendants, ERSI, alleged that he had lost his supervisory position with ERSI, as a result of acquisition of ERSI by Quality, a co-defendant, in a merger of the two companies, allegedly in violation of Clayton Act, Section 7, 15 U.S.C. 18, Held that the plaintiff employee had stated a cause of action against both defendants.

In Isador Weinstein v. Hearst Corp., 303 F.Supp. 646 (N.D.Calif. 1969) an employee, an officer of a corporate book retailer, joined with his employer as a plaintiff in an antitrust suit against defendant, certain publishing companies, alleging pooling profits, fixing circulation and advertising sales by defendants, etc., Held that the corporate officer could state a cause of action for loss of his salary when his employer was forced to cease business as a result of defendant's violations.

In Nichols v. Spencer, 371 F.2d 332 (7th Cir. 1967), a former employee of defendant had been discharged by defendant pursuant to a so-called "no switching" agreement entered into by defendant with other firms in the industry whereunder former employees of the competing firms would not be hired until six months after termination of their former employment. Held that plaintiff's actions should not have been dismissed by summary judgment.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 77-3985

FRANK J. OSTROFE, Plaintiff-Appellant,

vs.

H. S. CROCKER COMPANY, INC., Defendant-Appellee.

Before: BROWNING, Chief Judge, KENNEDY and SKOPIL, Circuit Judges

ORDER

Filed May 6, 1982

The panel as constituted in the above case has voted to deny the petition for rehearing, and a majority of the panel voted to reject the suggestion for a rehearing en banc. On the request of a judge in active service, a vote of the eligible judges in active service was taken on the suggestion for en banc rehearing. A majority voted against en banc rehearing. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

82-174

No.

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.,
Petitioner,

VS.

FRANK J. OSTROFE,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DARRELL J. SALOMON
(COUNSEL OF RECORD)
601 California Street
Suite 2100
San Francisco, CA 94108
(415) 989-1100

ALIOTO & ALIOTO
111 Sutter Street
Suite 2100
San Francisco, CA 94104
(415) 434-2100

Attorneys for Respondent
Frank J. Ostrofe

Dated: August 31, 1982

BOWNE OF SAN FRANCISCO, INC. • 130 NINTH ST. • S.F., CA 94103 • (415) 864-6500

QUESTIONS PRESENTED

1. Whether, under the facts of this case, and consistent with the principles enunciated by this Court in *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540, the Ninth Circuit correctly found that Respondent Frank J. Ostrofe (who had been forced to resign his position because he refused to participate in a price fixing scheme by his employer) had standing to sue his employer under the Section 4 of the Clayton Act.

TABLE OF CONTENTS

	Page
Questions presented	i
Brief statement of the case and opinions below	1
I	
There is no necessity to resolve any past conflict in the approaches of the courts of appeals to standing to sue under section 4 of the Clayton Act	2
II	
Respondent's injury flows from anticompetitive behavior and is within the area of congressional concern	5
III	
The court of appeals correctly held that evidence of conspiracy should not be fragmented	6
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases

Page

Bichan v. Chemetron Corp., ... F.2d ....., 1982-2 Trade Cases ¶ 64,807 (7th Cir. 1982) 4

Blue Shield of Virginia v. McCready, 102 S.Ct. 2540, 1982-2 Trade Cases ¶ 64,791 (1982) .....i, 2, 3, 4, 5, 6

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1979) 5, 6

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 3

United States v. Wise, 370 U.S. 405 (1962) 6

Statutes

15 U.S.C., Section 15 ..... 2, 3

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.,
Petitioner,

vs.

FRANK J. OSTROFE,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent urges that Petitioner's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on March 8, 1982 be denied for the reasons set forth below.

BRIEF STATEMENT OF THE CASE AND OPINIONS BELOW

Respondent, Frank J. Ostrofe, former marketing director of H. S. Crocker Company, was forced to resign his position because he refused to participate in a scheme by his employer and other manufacturers of lithograph

paper labels to fix prices, rig bids, and allocate markets. The district court granted a motion for summary judgment based upon Crocker's argument that Ostrofe lacked standing to bring a private treble damages action against his employer. This, despite the provision of Section 4 of the Clayton Act (15 U.S.C. § 15) that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ." By an opinion dated March 8, 1982 the Ninth Circuit reversed, holding that, to the contrary, Ostrofe had standing to sue and that "the evidence was sufficient to create a factual issue as to whether Ostrofe had been discharged pursuant to an implied understanding among conspiring label manufacturers." (Petitioner's Appendix A at 26). Crocker seeks a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to resolve what is alleged to be a "growing conflict over the Clayton Act § 4 standing of employees" among the Circuits. (Petitioner's brief, page 9). In fact, as will be shown below, under the unique facts of this case and the holding below there is no need to resolve any past conflict in the approaches of the courts of appeals to standing to sue under section 4 of the Clayton Act.

I

THERE IS NO NECESSITY TO RESOLVE ANY PAST CONFLICT IN THE APPROACHES OF THE COURTS OF APPEALS TO STANDING TO SUE UNDER SECTION 4 OF THE CLAYTON ACT

In *Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540, 1982-2 Trade Cases ¶ 64,791 (1982), this Court last Term reviewed the applicable principles to be considered in analyzing standing to sue by private antitrust plaintiffs

under Section 4 of the Clayton Act (Act of October 15, 1914, c. 323, § 4, 38 Stat. 731, 15 U.S.C. § 15). Antitrust standing raises concern about duplicative recovery[1] and remoteness of injury, but "neither the statutory language nor the legislative history of § 4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4." The majority in *McCready* declared it would resolve the issue of remoteness by looking "(1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4."[2]

McCready involved the question of whether a subscriber to a health plan who was refused reimbursement for therapy by a psychologist (allegedly because of an unlawful conspiracy to restrain trade in the psychotherapy market) had standing to maintain an action under § 4 of the Clayton Act because of the plan's failure to provide reimbursement for the costs of that treatment. This Court affirmed the judgment of the Fourth Circuit Court of Appeals that McCready had standing to sue under § 4 of the Clayton Act.

The petitioner in *McCready* argued that the Fourth Circuit should have followed the so-called "target area" test

---

[1]The instant case presents no possibility of duplicative recovery such as concerned this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[2]102 S.Ct. at 2547-2548.

of antitrust standing which prevails in the First, Second, and Fifth Circuit Courts of Appeals.[3] Petitioner Crocker in this case similarly urges that the Ninth Circuit Court of Appeals has departed from this test, noting that it is also the approach of the Seventh, Eighth and Tenth Circuits as well.[4] Whatever the merits of the "target area" principle, or any other approach to § 4 standing developed by the Courts of Appeals, this Court in *McCready* expressly declined to review the "substantial jurisprudence" regarding "remoteness" developed by the Courts of Appeals, declaring: "We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury."[5]

There is no necessity in this case to adopt or interpret the "target area" approach to standing as petitioner Crocker argues. Indeed, this Court in *McCready* clearly opted for a different approach to antitrust standing which focuses upon "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4."[6]

Accordingly, the critical point is not whether the Seventh[7] and Ninth Circuits has reached conflicting results in

---

[3] *Id.* at 2548, n. 14.

[4] *See* Petition at 16, n. 37.

[5] 102 S.Ct. at 2547, n. 12. In this case, the Court of Appeals observed that even within the Ninth Circuit the line of precedent applying the "target area" test has not had a clear and consistent rationale. Petition, Appendix A at 29, n. 7.

[6] *Id.* at 2548.

[7] Petitioner asserts that the result in *Bichan v. Chemetron Corp.*, ... F.2d ...., 1982-2 Trade Cases ¶ 64,807 (7th Cir. 1982) is contrary to the result in this case.

cases bearing similar facts, but whether the Ninth Circuit Court of Appeals has correctly considered the principles of standing to sue articulated in *McCready*. Respondent submits that it has.

II

RESPONDENT'S INJURY FLOWS FROM ANTICOMPETITIVE BEHAVIOR AND IS WITHIN THE AREA OF CONGRESSIONAL CONCERN

The Ninth Circuit Court of Appeals has clearly followed in this case the principles of antitrust standing which *McCready* announced. As in *McCready*, the harm to respondent was clearly foreseeable and a necessary step in effecting the illegal conspiracy.[8]

More importantly, the Court of Appeals gave full consideration to the question of whether respondent's action is limited by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1979), which requires that the antitrust injury flow from the defendant's anticompetitive acts.[9] The

---

[8]*Compare McCready, supra*, 102 S.Ct. at 2548-2549 ["McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed it was a necessary step in effecting the ends of the illegal conspiracy."], with Petition, Appendix A at 7-8 ["[T]he complaint alleged that Ostrofe was discharged and barred from further employment pursuant to a boycott agreement entered into as part and in furtherance of the price-fixing conspiracy . . . Persons injured by an agreed-upon refusal to deal employed as a part of a conspiracy to restrain or monopolize trade and commerce have been permitted to challenge the conspiracy as a whole even though their injuries did not result from the restraint on competition that was the principle [sic] object of the conspiracy."]

[9]429 U.S. at 489.

Court of Appeals correctly concluded that:

> "The central theme of *Brunswick* is that to be actionable under Section 4, plaintiff's injury should fall within the core of Congressional concern underlying the substantive provision of the antitrust laws allegedly violated."[10]

The Court pointed out that Congressional concern with the conduct of employees acting on behalf of conspiring economic entities can be read from the imposition of criminal liability upon them when they violate the Sherman Act in a representative capacity for their employers.[11] Furthermore, unlike *Brunswick*, the loss in this case results not from increased competition, but from anticompetitive behavior.[12] The injury to respondent in this case is so clearly "inextricably intertwined" with the antitrust injury which the conspirators sought to inflict, that respondent's injury "'flows from that which makes defendants' acts unlawful' within the meaning of *Brunswick*, and falls squarely within the area of congressional concern."[13]

III

THE COURT OF APPEALS CORRECTLY HELD THAT EVIDENCE OF CONSPIRACY SHOULD NOT BE FRAGMENTED

The Ninth Circuit Court of Appeals noted that even if *Brunswick* were interpreted as limiting recoverable damages to those caused by the anticompetitive effect of an antitrust violation, respondent's boycott claim would still

---

[10]Petition, Appendix A at 22. [Footnote omitted.]

[11]*Id. See United States v. Wise*, 370 U.S. 405 (1962).

[12]*Id.* at 23.

[13]*McCready, supra*, 102 S.Ct. at 2551.

be valid. His injury results directly from the elimination of competition for his services, which is clearly an anti-competitive effect of the boycott.[14]

Petitioner, however, argues that the Court of Appeals has merely drawn an inference of an underlying conspiracy to boycott non-cooperating employees from evidence of a price-fixing conspiracy among petitioner and its competitors. This simply is not true. The Court of Appeals held that the district court should have considered the relationship between the conspiracy to fix prices and the conspiracy to boycott respondent when it ruled on his anti-trust claim, because it would be reasonable to infer that the price-fixing conspirators had also impliedly agreed to secure the adherence of their sales personnel to the conspiracy or remove any non-cooperating employees who jeopardized implementation of the conspiracy.[15] But such an inference is not unsupported by any evidence. The Court of Appeals found:

> "These inferences draw further support from the evidence that employees of Crocker's co-conspirators complained to Ostrofe about sales he made in violation of the conspiracy, that 'highly placed' executives of the competing manufacturers complained to Crocker regarding Ostrofe's failure to adhere to the prices and territories agreed upon, and that Crocker then threatened to fire Ostrofe and bar him from future employment in the industry if he refused to cooperate."[16]

Therefore, contrary to what petitioner asserts, the decision of the Court of Appeals does not permit an employee

---

[14]Petition, Appendix A at 34, n. 24.

[15]*Id.* at 24-25.

[16]Id. at 25 [Footnote omitted.]

to go to trial on a subsidiary boycott claim merely by advancing evidence that his employer participated in a price-fixing conspiracy. Evidence has been produced in this case to create material issues of fact, and the issues should not have been decided against respondent on summary judgment motions.

CONCLUSION

For the foregoing reasons, Ostrofe respectfully submits that the petition for certiorari should be denied.

Dated: August 31, 1982

Respectfully submitted,

DARRELL J. SALOMON
(COUNSEL OF RECORD)

ALIOTO & ALIOTO
Attorneys for Respondent
Frank J. Ostrofe

Office - Supreme Court, U.S.
FILED
SEP 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-174

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.
Petitioner,

VS.

FRANK J. OSTROFE,
Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES T. FOUSEKIS
(COUNSEL OF RECORD)
LEO L. FINKELSTEIN
STEINHART & FALCONER
333 Market Street
Suite 3200
San Francisco, CA 94105
Telephone (415) 777-3999
Attorneys for Petitioner,
H. S. Crocker Company, Inc.

Dated: September 17, 1982

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
I. The question of employee standing is generating conflicting decisions throughout the country; unless resolved by this court, an employee's right to an antitrust cause of action will be dependent on venue	2
II. Respondent has not rebutted petitioner's presentation of the summary judgment issue	5
Conclusion	7

TABLE OF AUTHORITIES CITED

Cases

	Page
Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982)	2, 3
Blue Shield of Virginia v. McCready, 102 S.Ct. 2540 (1982)	1, 2, 4, 5
Booth v. Radio Shack Division, C.A. No. 813670 (E.D. Pa. 1982)	2
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	4
Callahan v. Scott Paper Co., 541 F.Supp. 550 (E.D. Pa. 1982)	2
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1962)	2, 6
McNulty v. Borden, 542 F.Supp. 655 (E.D. Pa. 1982)	2
Perry v. Hartz Mountain Corp., 537 F.Supp. 1387 (S.D. Ind. 1982)	2
RJM Sales and Marketing, Inc. v. Banfi Products Corp., C.A. 4-81-212 (D.Minn.), argued September 8, 1982	3
Shaw v. Russell Trucking Line, Inc., 542 F.Supp. 776 (W.D. Pa. 1982)	2

Statutes

Clayton Act, § 4 (15 U.S.C. § 15)	passim

Rules

Supreme Court Rules:	
Rule 17.1(a)	3
Rule 28.1	1

Other Authorities

Antitrust and Trade Regulation Report, Volume 43, No. 1073, July 15, 1982	2

No. 82-174

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

H. S. CROCKER COMPANY, INC.
Petitioner,

VS.

FRANK J. OSTROFE,
Respondent.

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In his response to Crocker's Petition for Writ of Certiorari,[1] respondent urges in summary fashion that certiorari be denied because (1) the facts of this case are "unique", (2) the conflict among circuits over Section 4 standing is a "past conflict" not worthy of resolution in this case, and (3) the inference of conspiracy used by the court of appeals to reverse the district court's grant of summary judgment was properly supported by evidence. In fact, however, (1) this case is *not* unique; there have been at least seven federal court decisions in 1982 *alone* on the question of a discharged employee's standing to sue for *antitrust* damages; (2) there is a square conflict among circuits on the employee standing issue, which was not resolved by this Court's decision in *Blue Shield of Virginia*

[1]Pursuant to Supreme Court Rule 28.1, Petitioner H. S. Crocker Co., Inc. is a California corporation with no parent companies, non-wholly-owned subsidiaries, or affiliates.

v. McCready, 102 S.Ct. 2540 (1982); and (3) the decision below rests on an inference of conspiracy which is contrary to this Court's decision in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1962), and which, if allowed to stand, could convert every price-fixing case into a case involving a subsidiary conspiracy to boycott allegedly nonsupportive employees.

I. The Question of Employee Standing Is Generating Conflicting Decisions Throughout the Country; Unless Resolved by This Court, an Employee's Right to an Antitrust Cause of Action Will Be Dependent on Venue

There is no basis for respondent's contention that "under the unique facts of this case and the holding below there is no need to resolve any past conflict in the approaches of the courts of appeals to standing to sue under section 4 of the Clayton Act."[2] The issue of employee standing is one of general, and growing, importance under the Clayton Act, Section 4, and the square conflict among the circuits is current and very much alive.[3]

There have been at least seven federal court decisions in 1982 alone involving the question of an employee's standing to maintain an antitrust action challenging an allegedly wrongful termination.[4] In all these cases there were allega-

---

[2]Respondent's Brief at 2.

[3]Contrary to respondent's suggestion, the characterization of recent decisions in this area as creating a "growing conflict" is that of the editors of a leading trade periodical, and not merely an allegation of Petitioner. *See* Antitrust and Trade Regulation Report, Volume 43, No. 1073, July 15, 1982.

[4]In addition to this case, those decisions are *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982); *Shaw v. Russell Trucking Line, Inc.*, 542 F.Supp. 776 (W.D. Pa. 1982); *McNulty v. Borden*, 542 F.Supp. 655 (E.D. Pa. 1982); *Callahan v. Scott Paper Co.*, 541 F.Supp. 550 (E.D. Pa. 1982); *Perry v. Hartz Mountain Corp.*, 537 F.Supp. 1387 (S.D. Ind. 1982); *Booth v. Radio Shack Division*, C.A. No. 813670 (E.D. Pa. 1982).

tions that the defendant employer violated the antitrust laws, that the plaintiff employee refused to participate or threatened to refuse to participate in the alleged antitrust violation, and that the plaintiff employee was fired or forced to resign as a result of alleged non-cooperation.[5] These allegations, which are not unique to the present case, have given rise to different results in different circuits.

In its June 25, 1982 decision in *Bichan v. Chemetron Corp.*, 681 F.2d 514 (7th Cir. 1982), the Seventh Circuit expressly rejected the holding of the Ninth Circuit below, and recognized that its opinion "creates a conflict between the Seventh and Ninth Circuits."[6] Yet respondent argues that the conflict in decisions is a "past conflict" and one that is not critical. What conflict is more current and critical than one in which one circuit permits claimants a federal remedy, and another three months later denies similarly situated claimants access to that same remedy? Are terminated employees in San Francisco, Los Angeles, Phoenix, Honolulu, and Seattle going to be permitted to seek *federal* antitrust relief, while such employees in Indianapolis, Milwaukee, and Chicago are not? That is the state of the law today, and it begs resolution by this Court.[7] It is the precise situation in which this Court's rules provide that a petition for certiorari should be considered.[8] If left unresolved, the right of an employee plaintiff to seek substantive federal antitrust relief based on an alleged wrongful discharge will inequitably be dependent solely on venue.

---

[5]Allegations of this nature are not limited to salaried or commissioned employees. For instance, in *RJM Sales and Marketing, Inc. v. Banfi Products Corp.*, C.A. 4-81-212 (D.Minn.), argued September 8, 1982, the plaintiff is a former *sales agent* seeking federal antitrust relief on his claim of wrongful termination.

[6]681 F.2d at 514.

[7]Crocker expects that by the time this Court considers Crocker's Petition, plaintiff's Petition for Certiorari in *Bichan* will also be before the Court.

[8]Supreme Court Rules, Rule 17.1(a).

Respondent nonetheless urges that certiorari be denied in this case because in his view the court below has clearly followed the principles of standing recently announced by this Court in *Blue Shield of Virginia v. McCready*. Respondent is mistaken. In *McCready*, this court reemphasized that certain injuries are simply "too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under § 4."[9] The question of remoteness depends primarily upon "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4."[10]

As applied in this case, the focus must be on the forms of injury in Congress' mind when it chose to outlaw price-fixing, bid-rigging, and customer allocation conspiracies. The question presented is whether the legal injury allegedly sustained by respondent—discharge from employment—is one of those forms of injury. As pointed out in Crocker's Petition, such injury clearly includes the artificial increase in prices which *customers* must pay due to a non-competitive market, and the loss sustained by non-conspiring *competitors* injured in their ability to compete. Until the decision below, however, no court had ever concluded that *employee discharge* was an injury which Congress sought to remedy when it outlawed price-fixing in the Sherman and Clayton antitrust acts.

As support for his contention that *McCready* disposes of the "remoteness" issue, not only in the consumer standing situation actually presented there, but in employee standing cases as well, respondent points solely to two utterly irrelevant considerations. First, he asserts that his case is like *McCready*, and unlike *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), because his

---

[9] 102 S.Ct. at 2547.

[10] *Id.* at 2548.

injury flows from "anticompetitive" behavior.[11] But the fact that the underlying conduct at issue was allegedly anticompetitive begs the essential question of the relationship of the injury alleged to the type of injury Congress was concerned about in passing the antitrust laws. *McCready* clearly did *not* hold that every plaintiff is entitled to antitrust standing merely by alleging an underlying claim of anticompetitive conduct.

Second, respondent contends that congressional concern for employees can be discerned from the imposition of criminal liability on employees who violate the Sherman Act.[12] But there is no rational connection between Congress' choice to impose a criminal penalty on employees acting in violation of the antitrust laws, and the injuries Congress was seeking to prevent when it prohibited price-fixing, bid-rigging, and customer allocation conspiracies.

The court below did *not* correctly apply the principles enunciated in *McCready*, and *McCready* did *not* dispose of the standing issue. Resolution of the circuit court conflict is needed.

II. Respondent Has Not Rebutted Petitioner's Presentation of the Summary Judgment Issue

Respondent argues that the inference of boycott drawn by the Ninth Circuit below to reverse summary judgment in favor of petitioner was proper. He claims that the inference was supported by evidence that while respondent was employed by Crocker, industry personnel and Crocker executives allegedly attempted to coerce him to cooperate with an alleged price-fixing scheme. Respondent's argument misses the point.

On motion for summary judgment, Crocker made an extensive showing based on evidence developed in dis-

---

[11] Respondent's Brief at 5-6.

[12] *Id.* at 6.

covery that no boycott existed following respondent's resignation, and that it would not have been futile for respondent to apply for employment. The evidence presented by Crocker was that respondent had been urged to remain with Crocker, that respondent had failed in over seven years to seek any employment in the label industry, that respondent had *admitted* he was not interested in applying for employment in the label business, that industry executives would have considered respondent's application had it been made, and that such executives were not engaged in a boycott of respondent's services. In response, and despite ample opportunity over a number of years to develop support for his allegations, *respondent failed to come forward with any evidence probative of the existence of the alleged boycott* or that it would have been futile for respondent to apply for employment. He filed *no* affidavits in opposition, and simply failed to make the rebuttal showing required by *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1962), to prevent summary judgment.

In his opposition herein, respondent totally ignores *Cities Service*. Given Crocker's extensive showing on its motion for summary judgment, if the inference of boycott applied by the court below is allowed to stand, then indeed, as Crocker asserted in its Petition, any discharged employee will be able to pursue federal antitrust claims by advancing evidence that while employed, his or her employer participated in a price-fixing scheme and allegedly tried to coerce the employee into cooperating. If the employee lacks standing to challenge the alleged price-fixing scheme directly, he should not be allowed by this mechanism—i.e., the allegation of boycott supported by no evidence of boycott—to indirectly challenge that same alleged scheme.

The Ninth Circuit's inference of boycott to reverse summary judgment demands review by this Court.

CONCLUSION

Numerous reasons compel the granting of certiorari in this case. There is need to resolve the conflict among the Circuits on the question of antitrust standing in employee discharge cases, to provide guidance to lower courts and counsel where the line should be drawn in resolving the question of "remote" antitrust injury, and to prevent the unjustified expansion of treble damage litigation (particularly in wrongful discharge cases where state remedies exist) fostered by the antitrust standing and summary judgment rulings of the Ninth Circuit below.

Dated: September 17, 1982.

Respectfully submitted,

JAMES T. FOUSEKIS
(COUNSEL OF RECORD)
LEO L. FINKELSTEIN
STEINHART & FALCONER
Attorneys for Petitioner,
H. S. Crocker Company,
Inc.